

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





324  
**BRIEF FOR THE CONFEDERATED SALISH AND  
KOOTENAI TRIBES, PETITIONERS-INTERVENORS**

**RECEIVED** **United States Court of Appeals**  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SEP 19 1968

CLERK OF THE UNITED  
STATES COURT OF

No. 21767

**THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA,**  
*Petitioners,*

v.

**FEDERAL POWER COMMISSION, Respondent,  
THE MONTANA POWER COMPANY, Intervenor.**

No. 21904

**THE MONTANA POWER COMPANY, Petitioner,**

v.

**FEDERAL POWER COMMISSION, Respondent,  
THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA,  
STEWART L. UDALL, Secretary of the Interior,**  
*Intervenors.*

**Petitions to Review Orders of the Federal Power Commission**  
**United States Court of Appeals**  
for the District of Columbia Circuit

**FILED SEP 19 1968**

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### QUESTIONS PRESENTED

The Federal Power Commission substantially increased the annual charges to be paid by the Montana Power Company to the Tribes, for the right to exploit a valuable hydroelectric power site on the reservation. The charges had not been increased for 20 years, though the Company's profits from the site had greatly increased. The question is whether the Commission's valuation of the site, and readjustment of the charges, are rational and supported by substantial evidence.

Subsidiary questions raised by the Company concern the jurisdiction of the Commission and this Court; the date on which the increased charges should go into effect; and the interest allowed on the back rental payments.

Pursuant to Rule 8(d) this case  
has not been before this Court.

Charles A. Hobbs

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# **United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 21767 and 21904**

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**THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA,**

**THE MONTANA POWER COMPANY,**  
*Petitioners,*

**v.**

**FEDERAL POWER COMMISSION,**  
*Respondent,*

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**Petitions to Review Orders of the Federal Power Commission**

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**BRIEF FOR THE CONFEDERATED SALISH AND  
KOOTENAI TRIBES, PETITIONERS-INTERVENORS**

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## **STATEMENT**

This case involves two petitions for review of a decision of the Federal Power Commission increasing the annual charges for the Kerr power site from \$238,375 to \$950,000 per year. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (the Tribes), are the owners of the site, and they petition for review on the grounds that \$950,000 is not enough. The other petitioner is the Montana Power Company, the lessee of the site, who claims that \$950,000 is too much.

### **1. The Confederated Tribes of the Flathead Reservation**

The Flathead Reservation, consisting of about 1,300,000 acres, R. 107, is located in western Montana. It was created by the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975. The Indians of that reservation are called the Confederated Salish and Kootenai Tribes. They are organized as a self-governing tribe under the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461-479, and comprise about 5,300 men, women and children. R. 104, 126.

The Tribes' two main productive resources are timber and the Kerr power site. In 1965 the tribal income was \$1,010,000, of which \$690,000 came from sale of timber and \$238,375 came from Kerr power site rentals. R. 126. Of this, \$347,000 was paid out in municipal operating expenses and programs, and about \$477,000 was paid out in small (\$90) dividend cash payments to the members. R. 106, 125-6, 128. These were in the nature of subsistence grants. R. 107. The reservation is considered an "impoverished area" by the federal government. R. 129.

The reservation boundary runs east-west through Flathead Lake, so that the southern half of the lake is within the reservation. The lake is drained by the Flathead River, which leaves the lake at the southern end and flows south through the reservation to the Columbia River and Pacific Ocean.

About 5 miles downstream from the lake's exit is a narrow, high canyon, ideally suited for a hydroelectric power site. There the Montana Power Company built Kerr Dam and a power plant, pursuant to a license issued by the Federal Power Commission.

### **2. The Montana Power Company**

The Montana Power Company is a Montana corporation with home offices at Butte. Its revenues from sales of its electric department rose from \$18,000,000 in 1949, to \$39,000,000 in 1964. Exh. CT-5, Sched. 6, Sheet 2 (R.

1555). It is an unusually well-managed and successful company. Its rate of return on investment has ranged from a low of 8.73% in 1954 to a high of 11.19% in 1964.<sup>1</sup> A Federal Power Commission study showed that the Company's electric utility rate of return was third highest in the country in 1962 and 1963, and second highest in 1964 and 1965.<sup>2</sup>

### 3. The Federal Water Power Act

In 1920, in a comprehensive statute called the Federal Water Power Act, Congress created the Federal Power Commission, consisting of the Secretaries of War, Interior and Agriculture. 41 Stat. 1063, 16 U.S.C. §§ 791-823. The function of the Commission included investigating utilization of water resources, investigating the water power industry, determining the fair value of government power, and the like. 41 Stat. 1065-7.

The Commission was empowered to issue licenses up to 50 years, to persons who proposed to build power dams involving navigable waters or government lands. 41 Stat. 1065-6. These licensees were subject to regulation by the Commission with respect to their system of accounts, any effects on navigation, rates in certain cases, and other matters.

With respect to Indian lands Section 10(e), 41 Stat. 1069, provided that:

<sup>1</sup> Exh. CT-5, Sched. 6, Sheet 1 (R. 1555). This return is computed by federal standards (and those of most states) whereby assets are valued at original cost less depreciation. R. 466. By Montana State standards, however, assets are allowed to be valued at "fair value" and on this basis the Company's allowable return is said to be 5.33%. MPC Br. 48; R. 502-3. This is equivalent to 8.0% return by federal standards. R. 503. Actually, as stated in the text above, the Company has consistently earned a return of more than 8.0%.

<sup>2</sup> FPC S-168, "Statistics of Electric Utilities in the United States, 1966, Privately Owned", pp. 651-653.

"... when licenses are issued involving . . . tribal lands embraced within Indian reservations the commission shall fix a *reasonable annual charge* for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license . . . ." (Emphasis added)

#### 4. The License for the Kerr Hydroelectric Project

In 1928 Congress authorized the Federal Power Commission to issue a license for the development of power sites on the Flathead Reservation, "upon terms satisfactory to the Secretary of the Interior," and provided that the rentals for the use of Indian lands were to be credited to the Indians. 45 Stat. 200, 212-213.<sup>3</sup>

On May 23, 1930, with the approval of the Secretary of the Interior, the Commission issued a license, for a term of 50 years, to the Rocky Mountain Power Company, a wholly owned subsidiary of petitioner, Montana Power Company (the Company). Exam. Op. R. 9715. The license called for construction of the dam, and installation of three generators, within three years. Art. 6, R. 8854.

The "reasonable annual charge" was set forth in detail in the license; it rose to \$160,000 until the fifteenth year, and thereafter was a flat \$175,000. Art. 30(A)(3), R. 8854. Pursuant to Section 10(e) of the Federal Water Power Act, quoted above, which provided that readjustments of the charge were to be fixed "in a manner to be described in each license," Article 30(D) of the license

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<sup>3</sup> It may be of interest to note, while not relevant herein, that the Indians, unlike others, have a compensable interest in the power values of their lands. *Confederated Salish & Kootenai Tribes v. United States*, 181 Ct.Cl. 739 (1967); *United States v. 5677.94 Acres of Land*, 162 F.Supp. 108 (D.Mont. 1958); see *Winters v. United States*, 207 U.S. 564 (1908).

provided that after twenty years the rental could be readjusted "by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior." And in case the three parties could not agree, then the rental question was to be submitted to arbitration "in the manner provided for in 'The United States Arbitration Act' . . . ."

On June 23, 1930, Congress reorganized the Commission to consist of five appointed full-time commissioners, in lieu of the Secretaries of War, Interior and Agriculture. 46 Stat. 797.

The Rocky Mountain Power Co. failed to complete construction within three years, as required by its license, and after further delays the matter was referred to the Attorney General for "appropriate proceedings looking toward the revocation of the license."<sup>4</sup>

#### 5. Subsequent Events—The Indian Reorganization Act and The Federal Power Act

In 1934 Congress enacted the Wheeler-Howard Act, also called the Indian Reorganization Act (IRA), 48 Stat. 984, the purpose of which was to aid Indian tribes and give new powers of self government to tribes which organized themselves under the Act. The Confederated Tribes

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<sup>4</sup> Exam. Op. R. 9715. The details are relevant, see pp. 29-30 below. Art. 6 of the original license called for starting work by May, 1931, and completion by May, 1933. Work was abandoned in 1931. In December, 1932, Rocky Mountain was granted a two year extension for completion to May, 1935. Sometime prior to August, 1934, Rocky Mountain asked for an "indefinite extension of time." The Interior Department refused. The project remained uncompleted by May, 1935, at which time the license went into default by its own terms. The matter was then referred to the Attorney General. Sec. 26 of the Federal Water Power Act, 41 Stat. 1076, at that time provided that the Attorney General, on request of the Commission, could institute proceedings for revocation of a license. The license was not restored to good standing until July 17, 1936, when Amendment No. 2 was approved by the Commission. MPC Exh. 39, R. 1725; Exh. K by Ref., R. 8390; *Third Unit* case, 22 F.P.C. 502, 515 (1959).

organized themselves under the Act in October, 1935. Exam. Op. R. 9715.

Then in August, 1935, while the revocation proceedings of the Rocky Mountain license were still pending, Congress enacted the Federal Power Act, 49 Stat. 838, 16 U.S.C. § 791, which was a modernization and restatement of the Federal Water Power Act. The new Act amended the language of Sec. 10(e), quoted at p. 4 above, to provide for tribal approval of the initial annual charge (if the tribe was organized under the IRA), and of all subsequent readjustments of that charge. The readjustments were no longer to be fixed "in a manner to be described in each license," but by the Commission alone, subject to approval of the tribe. The standard for the charge, "a reasonable annual charge," was not changed.

The Company took up negotiations with the Confederated Tribes, who were now clothed with the new powers of self determination pursuant to the IRA, and Amendment No. 2 to the Kerr license was approved by the Tribes, the Secretary, and Rocky Mountain in 1936. Exam. Op. R. 9715; R. 9043; note 4 above. Montana Power Co. took over the license in lieu of Rocky Mountain in 1938. R. 9715.

The Kerr Dam and power house were thereupon completed, and electricity began to flow to the Company's consumers in May, 1939. The dam was 381 feet long and 200 feet high. The reservoir was Flathead Lake itself, 5 miles upstream from the dam, and the licensee was entitled to let the lake build up as high as 2,893 feet above sealevel, and to draw it down to 2,883 feet when needed. The capacity of this 10 foot storage area was 1,217,000 acre feet. Exam. Op. R. 9713, 9721.

The original license required installation of three generating units with a combined capacity of not less than 150,000 HP, within three years, and as noted this condition was not met. The license as amended in 1936 called

for one unit by May, 1939, and a second by January, 1949, with a combined capacity of 154,000 HP. Art. 6, R. 9043. These dates were met.<sup>5</sup> The original license called for graduated increasing rental charges reaching \$175,000 per year beginning the 15th year; the amended license called for rents rising to \$205,000 in 1954, and thereafter \$175,000. Art. 30, MPC Br. 11a.

In 1951 the United States put into operation a dam at Hungry Horse, Montana, in the headwaters of the Flat-head River, 50 miles upstream from Kerr Dam. Because this dam could release stored waters to Kerr during low-water periods,<sup>6</sup> it became feasible to install a third generating unit at Kerr. The Company applied to the Commission for a license to install the third unit, which was granted, and the unit went into operation in December, 1954. Eventually the Commission set the extra rent attributable to the Third Unit at \$63,375, making a total annual rental of \$238,375.<sup>7</sup> The additional rental of \$63,375 was approved by this Court in 1962.<sup>8</sup>

#### 6. The Hearing Before the Examiner on Readjustment of Rentals

The first 20 year period under the amended license expired in May, 1959, and at that time, as was their right under the statute and the license, the Tribes petitioned the Commission for readjustment of the rental charges. The Company failed to offer an increased rental agreeable to the Tribes, so the Commission set the matter down for hearing. The parties were the Tribes, the Secre-

<sup>5</sup> *Montana Power Co. v. F.P.C.*, 112 U.S.App.D.C. 7, 298 F.2d 835 (1962), herein called the "Third Unit" case.

<sup>6</sup> This is called "headwater benefit", and as will be seen, goes to the question of the commercial value of the Kerr power site. See pp. 49-50 below.

<sup>7</sup> *Third Unit* case, note 5 above. See also 22 F.P.C. 502 (1959), and 25 F.P.C. 221 (1961).

<sup>8</sup> *Third Unit* case, note 5 above.

tary of the Interior (on behalf of the Tribes), Montana Power Company, and the Commission Staff.

The substantive provisions governing readjustment of the annual charges have always been set forth in Sec. 30 (D) of the license itself (MPC Br. 14a): the readjusted annual charges were to be

*" . . . reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to-wit: upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development." (Emphasis added.)*

It was agreed that the "most profitable purpose" was power development. The questions were (1) what was the annual "commercial value" of the tribal lands used for power development, and (2) what share of that value was fairly attributable to the Tribes as "reasonable charges."

#### 7. The Experts' Methods of Deriving "Commercial Value"

Most of the witnesses used the "net benefits" approach in computing the annual commercial value of the project. Under this method, the value of a project is determined by figuring the cost of providing an amount of energy equivalent to that provided by the project by the most likely alternative at the time the project was constructed. The amount by which the costs of an alternative source exceeds the cost of the subject project is said to be the "net benefits" of the project. FPC Op. R. 10077

One of the Tribes' witnesses, Van Scoyoc, used the "profitability" method, consisting of a detailed study of the revenues attributable to the Kerr Project for the years 1958 through 1964. The study embraced that share of the Company's total electric revenues reasonably attributed to Kerr together with a determination of the annual costs of producing power at the Kerr site, including



a reasonable return on the net investment of the Company in the facilities used in the generation of such power. The annual costs deducted from the annual revenues yielded the actual commercial value of the Kerr site, i.e. the profitability of the development to the Company. FPC Op. R. 10077. Van Scoyoc used methods of accounting approved by the Commission. R. 466-467; Exam. Op. R. 9730.

#### 8. The Experts' Divisions of "Commercial Value"

After deriving the annual "commercial value", based on the "net benefits" or "profitability" method, each witness allocated part of his "commercial value" figure to the Company, and part to the Tribes, and the share allocated to the Tribes was considered to be the fair annual charges.

The Commission Staff allocated 25% to the Tribes on the theory that if the Tribes owned all the realty involved in the project (i.e. the power site and Flathead Lake) it would receive 50% of the commercial value, and the Company would receive the other 50% for underwriting the development of the project. Exam. Op. R. 9732. But, since the Company had an investment in flowage rights to the north half of the lake,<sup>9</sup> the Staff thought the Tribes should receive only half of the landowners' one-half, or a net of 25%. Exam. Op. R. 9732.

The Company likewise used the 25% figure.

The Secretary used the same theory, but deemed the relevant land ownership to be just the power site, and not

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<sup>9</sup> As of 1958, the Company's total investment in the Kerr plant was \$15,700,000, of which only \$335,000, or 2%, was for "land and land rights," which would include the land and flowage rights in the north half of Flathead Lake. Exh. CT-5, Sched. 3, lines 18 and 28, R. 1564, and see R. 516. The reason the investment in land and water rights was so low was because the Company only had to purchase a small amount of land around the edges of the north half of the lake. The flowage rights to the north half of the main lake itself (the bed of which was owned by the State of Montana) it obtained without cost merely by filing a notice of appropriation with the State.

the lake. This gave the Tribes all of the 50% attributable to ownership of land. To this he added another 5.9% representing the storage benefits to the Company from the Tribes' ownership of the south half of Flathead Lake. Thus the Secretary's final percentage was 55.9%. Exam. Op. R. 9734.

Sporseen, one of the Tribes' witnesses, gave the Tribes 42.13% of the commercial value of Kerr power site. See R. 171-172. He would have given the Tribes 50% of the commercial value of the Kerr site, and the Company the other 50% because it developed the site, except that he considered that the Tribes' share should be reduced somewhat because the Company had an investment in flowage rights to the north half of Flathead Lake. So he set up his formula as follows: first, he segregated the three sources of the waters which flowed through the Kerr turbines during critical (low-water) periods. The total critical period energy generated at Kerr in 1964 (an average year) was 1,069 megawatt months (MWM). Of this, 161 MWM came from the natural stream flow at the site, 251 MWM came from Flathead Lake storage, and 657 MWM came from Hungry Horse storage.<sup>10</sup> Because Flathead Lake storage re-regulates Hungry Horse storage releases, simplifying operations at Hungry Horse and daily and weekly pondage at Kerr, Sporseen multiplied the Flathead Lake factor by 1.5, increasing it from 251 to 376 (thus *reducing* the Tribes' share). FPC Op. R. 10081-2, 10085.

He gave the Tribes only 25% of the Flathead Lake factor, since the Company had flowage rights to half of it, and gave the Tribes 50% of the balance. His final calculation, then, was:

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<sup>10</sup> If no reservoirs existed on the Flathead River upstream from Kerr Dam, the Kerr generators could generate no more than 161 MWM during low water periods from the basic, bare minimum run-of-the-river. Upstream reservoirs, however, can store waters during high water periods, and release them during low water periods for use by the Kerr turbines. The Flathead Lake storage capability thus added 251 MWM to Kerr's low-water capacity, and Hungry Horse added another 657 MWM.

	<u>MWM</u>		<u>Tribes' Share</u>	
Kerr Site	161	x	50%	= 80.5
Flathead Lake	376	x	25%	= 94.0
Hungry Horse	657	x	50%	= 328.5
	<u>1194</u>			<u>503.0</u>

$$\frac{503}{1194} = .4213 = \underline{42.13\%}$$

Van Scoyoc started with the same basic MWM factors, but adjusted them differently to arrive at a percentage figure of 57.53%. FPC Op. R. 10082.

#### 9. Summary of the Experts' Positions

In summary, then, the positions of the experts were thus (FPC Op. R. 10077, in descending order):

	<u>Annual Commercial Value</u>	<u>Percentage To Tribes</u>	<u>Annual Charges To Tribes</u>
<i>Secretary</i>			
Mohler	\$2,981,666	55.9	\$1,667,000
<i>Tribes</i>			
Van Scoyoc	2,254,000	57.54	1,300,000
Sporseen	2,474,000	42.13	1,150,000
<i>FPC Staff</i>			
Alt. A	3,427,000	25	857,000
Alt. B	2,529,000	25	611,250
Alt. C	2,550,400	25	632,350
<i>Company</i>			
Woy	1,410,000	25	352,500
Seymour	(used different method)		270,000

#### 10. The Examiner's Decision

The hearing before Presiding Examiner Ames W. Williams ran from October 28, 1965 to November 10, 1965. The record consisted of 1,348 pages of transcript, 81 exhibits, and 37 items by reference to the files of the Commission. Exam. Op. R. 9714. After thorough briefing by

the parties, the Examiner handed down his Initial Decision on August 4, 1966. R. 9712.

He found that the commercial value was \$3,427,000, and that the reasonable readjusted annual rental charge should be 25% of that, or \$856,750, which he rounded to \$850,000. (R. 9734).

This was based on a detailed consideration of all of the methods and assumptions used. He found some support for every method, R. 9733, but something to criticize about each of the methods too. As to the Company's proposals, he said, R. 9728:

"As previously stated, the Examiner is of the opinion that the Company's proposals are not realistic when viewed in the light of the facts of record and furthermore, in the language of Article 30(D) of the Kell License, they do not reflect as of 1959 the commercial value of the tribal lands involved."

As to Van Scoyoc's valuation, the Examiner said that his analysis "provides a realistic and impressive demonstration of the profitability of the operation of Project No. 5 [Kerr Plant] . . . ." However, the Examiner rejected Van Scoyoc's method principally because it was "a form of profit sharing not contemplated or intended by the parties negotiating the original Kerr License . . . ." R. 9730, 9731.

The Examiner, following the net benefits method, found that the initial Staff position (Staff Alternative A in preceding table) was the most reasonable commercial value, R. 9733, and he agreed with Staff's percentage factor of 25%, and came up with a final amount of \$850,000. R. 9734.

While rejecting Van Scoyoc's approach, the Examiner nevertheless felt that Van Scoyoc's analysis had demonstrated the profitability of the Kerr operation sufficiently as "in large measure" to justify the Examiner's rental figure of \$850,000. R. 9731.

### 11. The Proceeding Before the Commission

All four parties filed exceptions to the Examiner's decision, and the case went to the Commission, with another round of briefing.

On October 4, 1967, the Commission handed down its decision increasing the rental from \$850,000 to \$950,000. R. 10059.

Like the Examiner, the Commission saw some merits and some demerits in all of the approaches to the problem, R. 10078, but unlike the Examiner, the Commission thought Van Scoyoc's method came closest to the statutory intent, in that it was the only method which ascertained the value of the Kerr project lands for their most profitable purpose. R. 10079.

It felt the profitability method had the advantage over the net benefit method in that, R. 10079:

"... it is directly concerned with the actual operation of the project being considered and does not depend on such speculative aspects of the net benefits theory, as, for example, what alternative project the company would have constructed, a subject on which there is considerable debate, whether to use trended costs, or the appropriate level of coal costs for an alternative steam plant."

The Examiner had ruled that the profitability method was a form of profit sharing not intended by the license, but the Commission disagreed, believing that the parties, by use of the language "commercial value of the tribal lands involved, for the most profitable purpose for which suitable . . ." did intend that the profit from exploitation of the site should be a factor in the charges. FPC Op. R. 10079-80.

The Commission adopted Sporseen's division of 42.13% to the Tribes, saying it was the most reasonable one advanced. R. 10085-6.

In conclusion, the Commission applied Sporseen's percentage of 42.13% to Van Scoyoc's commercial value of \$2,254,286 per year, and came up with a reasonable charge of \$949,731, which it rounded to \$950,000. R. 10086. The Commission noted (R. 10080) that "in the absence of the Van Scoyoc method which we consider more reliable, we would be persuaded that the commercial value of the Kerr project approximates \$2,500,000."

The Commission noted that the Kerr plant represented over a third of the Company's entire installed generating capacity, and that the Company's electric revenues were \$31,400,000 in 1959, rising to \$39,300,000 in 1964. R. 10086.

On November 3, 1967, the Secretary of the Interior accepted the Commission's annual charge figure. R. 10099, 10157.

The Tribes and the Company duly asked for rehearing, and on March 21, 1968, the Commission denied rehearing with this comment (R. 10158):

"Both the Tribes and Montana improperly assume that the Commission's determination was based exclusively on the profitability method of Van Scoyoc and the allocation factor of Sporseen. This was not the case. The Commission's decision was based on the record as a whole, including the role of the Kerr project as a significant element in Montana's system and a major contributor to its earning power. The decision did use the profitability method as a guide in arriving at its end result, noting at the same time that a proper application of the net benefits method would have produced approximately the same result. In so doing, the Commission noted that the profitability method more closely conforms to the Commission's regulations on this subject."

## 12. Proceedings in This Court

On October 19, 1967 the Tribes filed a petition for review in this Court under 16 U.S.C. § 825l on the grounds

that the annual charges set by the Commission failed to include any value for net headwater benefits, which, if properly included, would have added \$42,000 to the annual charges. On November 3, the Company filed its petition for review in this Court.

### SUMMARY OF ARGUMENT

I. The readjusted annual charges fixed by the Commission are rational and supported by substantial evidence. The FPC license specifically calls for a fixed annual charge for the first 20 years, and thereafter the charge may be readjusted for further periods of at least 10 years. The readjusted charges are to be based on the "commercial value" of the site for the "most profitable purpose." The Kerr power site is a valuable asset, and the Company has made great profits each year since 1939 as a result of its exploitation of that site. There has never been an adjustment of the annual charges, except a small one in 1959 to account for the fact that the Company added another generating unit to the project.

After a thorough hearing the Commission found that on the record as a whole, the annual commercial value of the site, i.e. the return to the Company over and above its allowable rate of return, was about \$2,250,000 per year, and that the Tribes' fair share of this was \$950,000. It is clear that this conclusion is rational and supported by substantial evidence.

II-A. The original license approved in 1930 said that the readjustments of charges were to be by agreement among the parties if possible, otherwise by arbitration. At that time the Secretary of the Interior, who represented the Tribes as their trustee, sat as a member of the Commission, and would have had a conflict of interest had he sat on the Commission while readjusting charges for the Tribes. In 1935, after the Commission was reor-



ganized so that the Secretary no longer sat on it, Congress provided that readjustments were to be made by the Commission. The Company argues that this did not alter its right to arbitrate the readjusted charges. The argument should be rejected because the arbitration right was procedural only, not substantive, and could be changed by Congress without denying Due Process. Further, the probable original reason for the clause, the Secretary's conflict of interest, became moot when Congress reorganized the Commission. Finally, the Company's predecessor was in default under the 1930 license, and the new procedures were enacted before the license was restored to good standing, thus estopping the Company from claiming exemption from the new procedures.

II-B. In 1928 Congress gave the Secretary a veto power over the terms of any license issued for power development on the Flathead Reservation. And, the 1935 Act gives the Tribes the right to disapprove any readjustments in the annual charges. As the Tribes' trustee the Secretary might have power to speak for the Tribes in that regard. The Company says this power of review denies this Court jurisdiction to review the Commission's decision. While that is a strange position for an "appellant" to take, it is a moot question because the Secretary has approved the Commission's decision.

III-A. The Company says the Commission had to start with the old annual charges, and alter them only to the extent that new factors made them outdated. This is merely a matter of terminology. While the Commission said it was reviewing the matter de novo, all that means is that it was considering all factors, and not merely those few the Company argues are relevant. Besides, there is no statutory or other bar to a de novo proceeding.

III-B. The Company says the Commission relied on Van Scoyoc's profitability method without benefit of exceptions and argument, which if true is the Company's own fault, since it did not significantly except to that method



in its reply brief to the Commission. Besides, the Commission expressly relied on the record as a whole, and not just the profitability method. The Company says the method of allocating earnings to the Kerr plant was arbitrary; we show that it was highly rational. The Company complains about the Commission's treatment of headwater benefits; we show it was not only rational, but if the Commission had properly considered all of the factors it would have found an even higher value in favor of the Tribes. The Company says the profitability method is legally improper, as a form of "profit-sharing"; we show that to the extent the annual charges are "profit-sharing" it is called for by the very terms of the license itself.

III-C. The Company argues that allowing the Tribes 42% of the annual commercial value of the site is too much. We show that it is reasonable, and in fact that it could be argued that the Tribes are entitled to 100% of the commercial value, since the Company is a regulated utility and is not entitled to more than a reasonable return on its investment, and the commercial value is computed after allowance for that return.

III-D. The Company argues that the *Third Unit* proceeding in 1954 settled the annual charges for the third generating unit for 20 years from that date. We show that the third unit is merely part of the overall project, and that the readjusted charges apply to the entire project as it was found in 1959, not piecemeal according to the dates of acquisition of each of the elements of the project.

IV. The Company says that the readjusted charges cannot be retroactive to 1959, when the 20 year period ran out, but must be held up until approved by the Commission. If this were the case, the longer and harder the Company could resist a determination the longer it could delay the commencement of a new and fairer payment schedule. Considering the very large disparity between

the old annual charges the Company has been paying, and the charges which the Commission has found should have started being paid in 1959, the Company's argument lacks equity. The Commission allowed back payments in the *Third Unit* case.

V. The Company argues that the Commission cannot allow interest charges on the back payments due. The Commission has customarily allowed interest in rate refund cases, which the Commission deemed closely analogous to the instant case. The Commission allowed interest in the *Third Unit* case. Even under the common law, interest may sometimes be awarded to do equity.

VI. We originally petitioned for review on the ground that the Commission had improperly failed to give consideration to net headwater benefits, an important element of value, one that would have increased the annual charges by \$42,000 per year. However, we press the point only if the Court should have occasion to weigh the evidence underlying the Commission's decision, in which case our point must be considered.

**I. The Readjusted Annual Charges Fixed by the Commission Are Rational and Supported by Substantial Evidence**

This case is essentially a simple one. The Tribes happen to own a valuable asset, an excellent power site with a ready-made reservoir, and the question is what is a fair annual charge for the Tribes for letting the Montana Power Company exploit that asset.

Congress did not specify how the annual charges were to be determined, beyond stating that they were to be "reasonable." As this Court noted in the *Third Unit* case in 1962, 298 F.2d at 340, when the annual charge question was before the Court in another context,

"The annual charges shall be reasonable, Section 10 (e) says, and must be approved by the Secretary of the Interior and the Indians themselves; otherwise,

the statute is silent as to how Indian rentals shall be computed. So, the only question is whether the rental fixed by the Commission is reasonable."

This was an annual charge for conferring *commercial* benefits (and not an annual charge for conferring say scenic or conservation benefits), so the value of the right to exploit the asset can and logically should be related to the profits actually earned from its exploitation. This is not only common sense,<sup>11</sup> but it is required by the terms of the license itself, Art. 30(D), MPC Br. 14a, which specifies that the annual charges shall be based on—

"... the *commercial* value of the tribal lands involved, for the most *profitable* purpose for which suitable ...."

After an exhaustive administrative hearing, with all parties fully heard, the Commission found that on the record as a whole, the annual commercial value of the site, i.e. the return to the Company over and above its legally allowable rate of return,<sup>12</sup> was about \$2,250,000 per annum based on the profitability method, or about \$2,500,000 per annum based on the net benefit method (R. 10080 n. 8). Of this, the Commission concluded, the Tribes' fair share was \$950,000. It is clear that this conclusion is rational and supported by substantial evidence, and thus should be affirmed.

It is relevant to note that the Company makes good use of the Kerr site. The Kerr plant there is a "particularly efficient project." FPC Op. R. 10069; see also R. 511. The plant is "by far" the most important single power resource of the Company. Van Scoyoc, R. 508. The Com-

<sup>11</sup> And is in line with court decisions; e.g., see Holmes, J., in *Galveston H. & S.A. Ry. Co. v. Texas*, 210 U.S. 217, 226 (1908): "... the commercial value of property consists in the expectation of income from it ...." See also *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 526 (1941).

<sup>12</sup> The Company's return was not a small item—it averaged \$833,200 per year during the years 1958-1964. Exh. Ct-5, Sched. 3, R. 1564.

pany derives from its plant there about one-quarter of all the electricity it sold throughout Montana in the years 1958-1964. FPC Opn. R. 10086. During the same period its electric revenues rose from \$30,300,000 to \$38,900,000, and its electric net operating income rose from \$9,900,000 to \$13,600,000. Exh. CT-5, Sched. 6, Sheet 2. The Company's rate of return on investment is nearly the highest in the country for a regulated utility. See note 2 above. Because of normal income tax factors, the Company will actually end up paying less than half of the revised charges. R. 516.

## II. Response to the Company's Arguments that the Commission Lacked Jurisdiction (MPC Br. 11-35)

### A. *The Commission's Jurisdiction to Determine the Readjusted Annual Charges (MPC Br. 11-29)*

The Company asks this Court to rule an act of Congress unconstitutional merely because Congress changed the *procedure* for readjustment of annual charges under the Kerr license from arbitration to decision by the Commission.<sup>13</sup>

The Company contends that Congress did not mean what it said when it provided, Sec. 10(e), that such annual charges were to be readjusted "by the Commission."

But as we shall now show, the Company's interpretation of the statute is grounded upon a misreading of relevant statutory provisions and a distortion of the legislative history of the Federal Power Act.

This Court cannot avoid the constitutional challenge posed; the only possible construction of the statute in question necessarily upholds the jurisdiction of the Federal Power Commission to readjust the charges. As we

<sup>13</sup> No change was made in the *substantive* standard for readjustment which remains as before, the "commercial value" of the site for "the most profitable purpose for which suitable, including power development."

shall demonstrate, the Company's constitutional challenge to the Commission's exercise of jurisdiction is without merit and is grounded upon a stubborn refusal to recognize that Congress may change existing remedies or procedures for the protection of substantive rights without offending the "Due Process" clause of the Constitution.

1. *Section 10(e) of the Federal Power Act, as amended, Gave the Commission Power to Re-adjust the Annual Charges.*

The license involved in this case was originally issued under the provisions of the Federal Water Power Act of 1920 (41 Stat. 1063), which authorized the issuance of licenses for water power project works involving the use of lands and water rights owned by Indian tribes. Licensees under the Act were to pay annual charges to the Indians with the proviso that those charges might be readjusted twenty years after commencement of operation of the licensed project. Section 10(e) of the Act (41 Stat. 1069) provided that "charges may be readjusted . . . in a manner to be described in each license". Pursuant to this authority the subject license, in article 30(D),<sup>15</sup> provided for readjustment: (1) by "mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior", or (2) failing that, by "arbitration in the manner provided for in 'The United States Arbitration Act'".<sup>16</sup>

<sup>15</sup> See MPC Br. 13a-14a.

<sup>16</sup> The Company's "right" to arbitration, under Article 30(D), prior to the 1935 amendments, is not as well defined as it supposes. The license specifies "arbitration" in the manner provided for in the United States Arbitration Act, but that act specifies no "manner" of arbitration. As suggested by the Examiner (R. 9719) the arbitration provision of Article 30(D) may have amounted "to no more than a procedure to be followed under the Commission's aegis in order to resolve a deadlock in negotiations". The Commission, it will be recalled, at the time the license was drafted, consisted of the Secretaries of War, Agriculture and Interior, who may not have contemplated holding lengthy hearings to set readjusted charges.

The Company argues that only an arbitrator, not the Commission, has jurisdiction to readjust the charges. But the Company cannot escape the fact that the freedom to select arbitration to make the readjustment was terminated by the 1935 amendments to the Federal Water Power Act. Under Section 10(e), as amended, "... such charges may with like approval *be readjusted by the Commission* at the end of twenty years after the project is available for service" (emphasis supplied). Nothing could be plainer. What Congress wrote upon the palimpsest controls—not what it erased.

That Congress meant what it said in amended Section 10(e) is borne out by the legislative history. The Senate Report on S. 2796, which became the Federal Power Act of August 26, 1935 (49 Stat. 803), stated:

"Several minor changes are made in section 10(e), relating to the charges to be paid by the licensees. *The amendment also makes explicit the authority of the Commission to adjust from time to time all charges imposed under the act. In the proviso that charges for licenses involving the use of government dams shall be adjusted at the end of twenty years, there is introduced for the purpose of clarification the provision that such readjustment shall be made 'by the Commission'*"<sup>17</sup> . . . ."

The Company can derive no comfort from Section 28 of the Federal Water Power Act (retained in the Federal Power Act) which provided that no amendments to the Act "shall affect" outstanding licenses or "the rights of any licensee thereunder". It is well settled that the saving provisions of Section 28 apply to substantive rights and do not insulate licensees from changes in procedure that Congress may provide for the enforcement of rights and obligations under the Act. *Pennsylvania Power & Light*

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<sup>17</sup> S. Rept. No. 621, 74th Cong., 1st Sess. (1935) at p. 45, (emphasis added). See also H. Rept. 1318, 74th Cong., 1st Sess. (1935) to accompany H.R. 7160, at pp. 24-25.

*Co. v. FPC*, 139 F.2d 445 (3rd Cir. 1943), *cert. den.*, 321 U.S. 798 (1944); and *Safe Harbor Water Power Corp.*, 5 FPC 221 (1946), *aff'd*, 179 F.2d 179 (3d Cir. 1949), *cert. den.*, 339 U.S. 957 (1950).<sup>20</sup>

Indeed, while the Company asserts on page 22 of its brief that all procedural rights of licensees were saved by Section 28, it is forced to admit that procedures for judicial review of the Commission's service rate determinations were lawfully changed by the 1935 amendments "even as to prior licensees" (MPC Br. 28). And, of course, as we show, *infra*, pp. 29-30, the Company had no hesitation to avail itself of changed procedures under the license when it deemed these to be for its advantage.

The Company argues (MPC Br. 13-16) that the question of readjustment of annual charges was a major item of contention in the negotiations leading up to the grant of the license, as recorded in the "Scattergood Report." (S. Doc. No. 153, 71st Cong., 2d Sess., R. 8227 *et seq.*). The Company goes on to assert that the legislative history of the Federal Water Power Act and of Section 28 of the Act in particular demonstrates that the fruits of such negotiations as embodied in licenses granted under the Act were to be guaranteed against change (MPC Br. 22).

While the Scattergood Report does show that there was a considerable amount of palaver concerning a formula for determination of rentals in the first instance (the main alternatives being (a) fixed rate per horsepower pro-

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<sup>20</sup> See detailed discussion, *infra*, pp. 25-28. These cases are also dispositive of the Company's contention that Congress lacked Constitutional power to change the procedure for readjustment of annual charges from arbitration to decision by the Commission. *Annual Charges Payable by Licensees*, 31 F.P.C. 1555 (1964), cited by the Company (MPC Br. 21, fn.) also supports this distinction. There the Commission ruled that licensees would not be required to pay annual charges for reimbursing administrative costs to the Government in an amount greater than that prescribed in the license 31 F.P.C. at 1559. Of course the right to pay no more than a certain maximum charge specified in a license is a substantive right and not a procedural one.



duced; (b) combination of fixed charge and energy charge and (3) at a flat rental basis regardless of output (Report, pp. 49-53, R. 8277-81), there is scant mention in the report of the question of who was to determine readjustment of the charges. The fact that one proposal gave the Commission power to readjust the rates and was not adopted (Report, p. 63, R. 8291) does not establish that the question of readjustment procedure—to be decided a generation later—was a matter of critical importance to the parties. Indeed, the ambiguity of the provision finally adopted—providing for “arbitration” in the manner provided for in “The United States Arbitration Act” when that Act specifies no manner of arbitration—suggests that the *details* of this question were of scant importance to the Company when it negotiated and accepted the license.

It is true that the parties agreed to the general *principle* of arbitration, no doubt because one of the three Commissioners was the Secretary of the Interior, who as trustee of the Indians had an interest adverse to the Company. But when the Act was amended in 1935, the Commission no longer included the Secretary as a member, but consisted of five full-time appointees. See 46 Stat. 797 (1930). So the apparent original purpose of the arbitration provision had disappeared when Congress in 1935 expressly vested the readjustment decision making power in the Commission.

But in any case the legislative history adverted to by the Company (MPC Br. 16-21) only establishes in a general way that Congress intended to provide certainty for investors who might provide capital for power development. This general policy was not offended and investment security was not undone by the decision to change the procedure for readjustment of charges. We cannot help but note the much greater likelihood that the Commission would give more consideration to the investors' legitimate interests, and afford inherently fairer process—e.g., the right to cross examination, a written explana-





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tion of the reasons underlying the ultimate decision, and a fuller scope of judicial review—than would an arbitrator.

2. *Congress Could Constitutionally Change the Procedure for Redetermination of Annual Charges Under the License*

The Company generally avers (MPC Br. 26-29) the constitutional infirmity of amended 10(e), as interpreted by the Commission, presumably (the Company does not say) on the basis of the Due Process Clause.<sup>22</sup>

But the Company's argument fails under the familiar principle that Congress may constitutionally make retroactive changes in procedure provided for the vindication of substantive rights. *Ex Parte Collett*, 337 U.S. 55, 71 (1949); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 224 (1957):

"[S]o long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change." *Crane v. Hahlo*, 258 U.S. 142, 147 (1922).

Decisions by the Commission, affirmed by the courts, bear out the view that changes in procedure of the nature made in amended 10(e) suffer from no constitutional infirmity.

In *Pennsylvania Power & Light Co. v. FPC*, 139 F.2d 445 (3rd Cir. 1943) a constitutional attack was made upon the power of Congress to change the procedure for determination of a pre-1935 licensee's "net investment" in

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<sup>22</sup> Since the Contract Clause of the Constitution, Article 1, Sec. 10, only forbids *state* action impairing contracts and does not limit the power of Congress, see *Louisville Bank v. Radford*, 295 U.S. 555, 589 (1935); *Continental Bank v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648, 680-681 (1935), the Company must rest on the assertion that the amendment of Section 10(e), insofar as it changed the procedures specified in Article 30 (D) of the license, was in violation of the Fifth Amendment Due Process clause.

a project from determination by a district court to determination by the Commission. Ruling that the licensee had no "vested right" to have its "net investment" determined by one procedure or another, the court held that:

"... the change of procedure which the 1935 amendment brought about did not, as applied to the present proceeding, violate the Fifth Amendment." 139 F.2d at 453.<sup>23</sup>

Similarly in *Safe Harbor Water Power Corp.*, 5 F.P.C. 221 (1946), *aff'd* 179 F.2d 179 (3rd Cir. 1949), *cert. den.*, 339 U.S. 957, the Commission ruled that it had power to regulate a water power company's rates under the 1935 amendments (prior to the amendments the states could regulate the wholesale rates under Section 20 of the Federal Water Power Act and the Commission could act only in the event of failure to regulate by the states directly concerned). The Commission rejected the company's contention that the attempt to expand the Commission's juris-

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<sup>23</sup> The Company seeks to distinguish the *Pennsylvania Power & Light* case (MPC Br. 24) on the ground that the constitutional challenge was not ripe as applied to existing licenses and would not be ripe until the United States, relying upon the Commission's determination of "net investment", actually attempted to assert its right to recapture at the end of the fifty-year period of the license. On the contrary, the Commission's determination of "net investment" under Section 14 of the Act had sufficient effect upon that company so as to permit the court to rule on that company's challenge to the Commission's power. The Supreme Court, in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 421 (1940) determined the constitutional validity of amended Section 14 in the face of an argument by the United States that "consideration of the validity of § 14" could be "deferred until the United States undertakes to claim the right to purchase the project on the license terms fifty years after its issuance." 311 U.S. at 421. See also *California Oregon Power Co. v. FPC*, 99 U.S. App. D.C. 263, 239 F.2d 426, 433 (1956).

The Company states that the court in the *Pennsylvania Power* case dismissed Pennsylvania Power's constitutional challenge as "irrelevant". On the contrary, the court specifically ruled that it saw "no merit in these contentions" and that the application of amended Section 14 did not "violate the Fifth Amendment." 139 F.2d at 453.

diction could not apply to prior licensees with vested rights. The Commission ruled that:

"The alteration opposed here is one of procedure, and procedural changes may be effected without consent of the 'licensee'." 5 F.P.C. at 243.<sup>24</sup>

The Company asserts that this doctrine does not apply where the procedural right claimed "is one vis-a-vis other parties to the contract" as opposed to "the more general one against the state for the maintenance of particular institutions . . ." (MPC Br. 27-28). As the Company would have it a method provided for the enforcement of contract rights embodied in the contract cannot be regarded as procedural for purposes of "constitutional doctrine" under the principle that "[i]n contract law there can be no distinction between kinds of terms, since each is a product of a bargain." (MPC Br. 29.)

But the cases do not support the distinction urged. If, as the Company asserts, a license issued by the Federal Power Commission is to be regarded as a contract (MPC Br. 19) and if the Power Commission is to be regarded as a "party" to that contract (MPC Br. 15, 28) the li-

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<sup>24</sup> The Company points out that on appeal the Court of Appeals, in affirming the Commission's decision, ruled that the Commission could regulate the subject rates under Section 206 (part of the 1935 amendments) or Section 20 (the original section relied on by the Water Power Company) (MPC Br. 25). But the court's alternative ruling was not founded as the Company argues on any deference to the argument that changes in procedure were precluded as to prior licensees. The court reached the question of the Commission's jurisdiction under Section 20 out of an abundance of caution because it feared that a reviewing court might disagree with its interpretation of Section 206 (see 179 F.2d at 189). In affirming the Commission's decision that it had power to proceed under the 1935 amendments on a basis of expanded jurisdiction, the Court necessarily ruled the Congress had power to change procedures applicable to holders of licenses issued prior to the 1935 amendments. Moreover, in another context, the Court specifically approved the Commission's statement of the procedural-substantive distinction: ". . . as the Commission points out procedural changes may be effected without consent of the 'licensee'." 179 F.2d at 185-186, fn. 10.

censes involved in the *Pennsylvania Power and Safe Harbor* cases, *supra*, were contracts and the Commission was a party to each of the "contracts". To the extent the right to arbitration here is a right asserted "vis-a-vis" the Commission, as a party to a contract, the rights asserted by the companies in the *Pennsylvania Power and Safe Harbor* cases—the right to be free of the Commission's asserted power to determine "net investment" or regulate rates—were equally rights asserted "vis-a-vis" the Commission as a party to a "contract." This factor did not prevent the determination in those cases that *procedures* could be changed without offense to the Constitution.

A procedure for determination of substantive rights may be the subject of specific agreement between the parties to a contract, and without more, one party may be able to compel resort to that procedure for settling disputes that arise under the contract. But this is irrelevant to a determination whether the legislature may constitutionally substitute a different procedure for enforcement of substantive rights.<sup>25</sup>

The Company cites the cases of *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956) and *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *writ dismissed*, 364 U.S. 801, for the proposition that the right

<sup>25</sup> *Berkowitz v. Arbib & Houlberg*, 230 N.Y. 261, 270, 130 N.E. 288, 290 (1921), involved a contract which provided for "arbitration in the usual manner" of disputes under the contract. The court relying on the substantive procedural distinction held that the New York State Arbitration Law, which made such a provision enforceable and specified a procedure for arbitration that was not agreed to by the parties, could be enforced despite the fact that the contract was made prior to the passage of the law. See also *In Re Wilaka Construction Co.*, 17 N.Y.2d 195, 216 N.E.2d 696, 700 (1966). In *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), a case relied on by the Company, the Supreme Court upheld a state statute which changed the remedies provided for enforcement of a contract despite the fact that the parties had clearly contemplated resort to more stringent remedies when they entered into the contract. See dissenting opinion, 290 U.S. at 479.



to arbitration is "a right of great importance." We do not necessarily dispute this—procedural rights may be of great importance for a variety of reasons in a variety of contexts.<sup>26</sup> But this does not establish that Congress lacks constitutional power to modify them in an appropriate case.

3. *Montana Power Company is Estopped From Denying That It Is Subject to the Terms of Amended Section 10(e) of the Federal Power Act*

The Company cannot be heard to deny that it is subject to the provisions of Section 10(e) of the Federal Power Act, as amended, because it has previously relied upon those very provisions to save its license.

In 1935, Montana Power Company and its wholly-owned subsidiary, Rocky Mountain Power Company, after their default and *after* the amendment of Section 10(e) of the Federal Power Act, negotiated with the Tribes pursuant to that Section in order to restore the license to good standing. See note 4 above. (The Company and its

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<sup>26</sup> Thus, it has been held that agreements to arbitrate are substantive for choice of law purposes under *Erie Ry. Co. v. Tompkins*, 304 U.S. 64 (1938); see e.g., *Bernhardt Co. v. Polygraphic Co.*, 350 U.S. 198, *supra*. This stems from the overriding policy of *Erie* that the outcome of diversity cases in federal courts not be determined by the choice of the federal court as the forum. See 350 U.S. at 202-204. In another context *Robert Lawrence v. Devonshire Fabrics, Inc.* held that, for certain maritime contracts, Congress had established a federal "substantive" right to arbitration that superseded any state law to the contrary. In neither *Bernhardt* nor *Robert Lawrence* did the courts deal with the question of whether arbitration agreements are substantive for the purpose of testing the Constitutionality of Congressional action retroactively substituting another remedy for the remedy of arbitration. Indeed, the court in *Robert Lawrence*, 271 F.2d 402, 405, was careful to note that in many contexts the right to arbitration is considered procedural and specifically adverted, 271 F.2d at 406 (fn. 3), to the fact that arbitration was held to be "remedial" to determine if the New York [Arbitration] Act could constitutionally apply retroactively in the *Berkowitz* case.

subsidiary negotiated with the Tribes for the first time concerning the license because it was only after Section 10(e) was amended that such negotiations were permitted.) Further, the Company secured approval of the negotiated agreement resulting in Amendment No. 2 to the license from the Secretary of the Interior and the Federal Power Commission pursuant to that section, as amended. Finally, Rocky Mountain on June 30, 1936, accepted

“... all the terms and conditions of the foregoing instrument [the license] and of the Federal Water Power Act of June 10, 1920 (41 Stat. 1036), as amended . . . .” (R. 9055, emphasis supplied.)

In other words, in 1936, the Company specifically accepted the amendments to the Federal Water Power Act including amended 10(e) which it now seeks to avoid and which it states (MPC Br. 23) “had no application to licenses already executed.”

Certainly the Company cannot claim now that it was possible for it to avail itself of only a portion of amended Section 10(e), and yet not be bound by the remainder of the language, that requiring any readjustment to be *by the Commission*, on notice and opportunity for hearing, and subject to tribal veto.

Now, when Montana Power Company, for its own reasons, believes it would be to its benefit not to recognize the full force and effect of amended Section 10(e), but would be to its benefit to avoid the provisions of that section and have the past-due readjusted annual charges determined by a *single* arbitrator, it disdains recognition of the very section under which it in effect succeeded to its profitable license. Under the circumstances of relying on amended Section 10(e) to save its license, the Company is estopped now to deny the jurisdiction of the Commission as conferred by that section. Cf. *Callanan Road Co. v. United States*, 345 U.S. 507, 513, *reh. den.*, 345 U.S. 978 (1953).

**B. *The Secretary of the Interior's Veto Power Does Not Deprive This Court of Jurisdiction (MPC Br. 30-35)***

Focusing on the Secretary's asserted power to "veto" the decision of the Commission, the Company asserts that if the Secretary is correct this Court lacks jurisdiction because "Federal courts cannot accept jurisdiction to make determinations that may legally be reviewed and rejected by the executive" (MPC Br. 32). The Company relies primarily on *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), where the Supreme Court held there could be no judicial review of an order of the Civil Aeronautics Board that had been subjected to the broad review powers of the President.

It is difficult for us to see how this Court's lack of jurisdiction helps the Company and it is hard for us to believe that the Company actually wants the Court to dismiss its petition for want of jurisdiction—a result that would be required, albeit the Company does not ask for it, if the Company's argument is correct.<sup>27</sup>

In any case it must be remembered that the Secretary's asserted power is a power of *approval* only. He claims no power to readjust the charges in question himself or to directly modify the Commission's order in any respect. Moreover a decision by this Court that the Commission erred would be final and conclusive with respect to the *Commission*, and any subsequent order the Commission entered in the case would have to conform to the Court's determination. If the Secretary withheld his required approval from such a further order the order would merely not go into effect and the parties would stand where they

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<sup>27</sup> Apparently, the Company presents this jurisdictional conundrum only as a means to tempt this Court to rule the Company's way on the statutory issues and compel arbitration. It asserts that the jurisdictional "questions may be put to one side if the negotiation and arbitration provisions of the license are applied" (MPC Br. 34) and lets the matter rest at that.

are today with the Company paying at the old rate of \$238,000 a year.<sup>30</sup>

The *Waterman Case*—assuming its continued vitality<sup>31</sup>—is completely inapposite to the present situation. While the Supreme Court employed what this Court has characterized as “sweeping language”, *American Airlines, Inc. v. CAB*, 121 U.S. App. D.C. 120, 348 F.2d 349, 352 (1965), the decision actually turned on “. . . a reluctance grounded in the Constitution to exercise the power of judicial review over ‘political’ decisions of the executive.” *Id.* at 354 (concurring opinion).

The Court emphasized in *Waterman* that, unlike the Secretary’s claimed power here, the President’s power was no “mere right of veto” and that the CAB’s decision served merely as a “recommendation to the President” who exercises a “positive and detailed control” over every aspect of the Board’s order (333 U.S. at 109).

It was the President’s crucial role in shaping the *Waterman* order,<sup>32</sup> grounded upon his broad authority in matters of foreign affairs and national defense, which led the

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<sup>30</sup> This Court has already recognized the Secretary’s veto power in the *Third Unit* case (where the veto power question was thoroughly briefed) and apparently saw no problem. In the *Third Unit* case, note 5, *supra*, the Tribes urged that the Secretary retained the broad power of approval (See *Brief of Intervenor* in Nos. 15480 and 16359, September 1961, pp. 7-8) and the Company denied it (See *Reply Brief of Petitioner, id.* at p. 10). This Court, in passing, expressly agreed with the Tribe’s view of the matter. (See 298 F.2d at 338 fn. 2.)

<sup>31</sup> See generally Mills, *The Waterman Doctrine Revisited*, 54 Geo L.J. 5 (1965); and see *Pan American World Airways, Inc. v. CAB*, — U.S. App. D.C. —, 392 F.2d 483, 492 (1968), where the Court noted that “[t]hough *Waterman* has not been overruled by the Supreme Court, its apparently sweeping contours have been eroded by recent Circuit Court opinions.”

<sup>32</sup> In *Waterman* the President initially disapproved certain portions of the Board’s order and the Board revised the order to comply with the President’s discretionary determination (See 333 U.S. at pp. 110-111).

Supreme Court to deny judicial review after the order became final by virtue of Presidential action. The Court held that there could be no review of the order as finally approved because it "derives its vitality from the exercise of unreviewable Presidential discretion", 333 U.S. at 113, and embodies "Presidential discretion as to political matters beyond the competence of the Courts to adjudicate." 333 U.S. at 114.

Here the Secretary's power is a "mere right of veto". The Court can review the decision of the Commission, made subject to the Secretary's approval but not subject to his direct control as the CAB's order was in *Waterman*, without infringing on executive "discretion as to political matters".

We are advised that the Federal Power Commission concedes the power of this Court to review the order in question, which will no doubt appear in its brief about to be filed. As stated by Chief Judge Bazelon, concurring in the *American Airlines* case, 348 F.2d at 354-355: when the executive's "legal spokesman concedes that decisions sought to be reviewed are not political in nature, the Courts need to be cautious only to protect their own processes from abuse."

### III. Response to the Company's Arguments that the Commission's Readjusted Charges Should Be Set Aside (MPC Br. 35-57)

#### A. *The Readjusted Annual Charges as a De Novo Matter* (MPC Br. 36-38)

In the Company's view (MPC Br. 36-38) any authority exercised by the Commission to readjust the annual charges was narrowly circumscribed as to methodology. According to the Company (MPC Br. 36), the Commission had first to make a finding that the existing annual charges were "no longer reasonable" and then "readjust the annual charge to take into account the changed condi-

tions that made the previously reasonable charge no longer reasonable."

The Company does not cite any statutory requirement for any such procedure, and as the Commission noted, the Company's contention is contrary to "established practice in rate cases followed by this, and most other regulatory agencies". R. 10074. In such cases extremely broad discretion is granted to the regulatory body to determine or redetermine rates. See *Federal Power Commission v. Natural Pipeline Co.*, 315 U.S. 575, 586 (1942).

In any case, the Company is inaccurate in stating (MPC Br. 37) that the Commission never made a specific determination that "the current charges are unreasonable". The Commission, rejecting the Company's contention that re-adjusted charges should be \$277,000 or, at the outside, \$307,666 a year (R. 9808), specifically ruled that "... the Company's proposals are not reasonable", necessarily determining that the lower current annual charge of \$238,375 is "not reasonable." R. 10086.

**B. The Commission's Determination of Annual Value  
(MPC Br. 40-43)**

The Company says (MPC Br. 39) that the Commission selected Van Scoyoc's profitability method without the benefit of exceptions and argument. In the first place, as the Commission made clear, see quotation at p. 14 above, it did not rely solely on the profitability method, but rather on the record as a whole. It said it would have reached the same result on the net benefits theory. Secondly, as noted above, see table p. 11, the other witnesses (except the Company's), all of whom used the net benefit method, came up with *higher* "commercial values" than Van Scoyoc's \$2,524,286. The Commission itself said that "in the absence of the Van Scoyoc method which we consider more reliable, we would be persuaded that the commercial value of the Kerr project approximates \$2,500,000." FPC Op. R. 10080. Finally, the profitability method *was*



argued to the Commission by its only proponent, the Tribes. See our brief filed October 6, 1966, pp. 9-20, R. 9816. If the Company felt his method was improper, it should have so argued in the brief it filed November 9, 1966, in reply to our brief, R. 9945. It said not a word.

1. *The Commission's Method of Allocating Earnings to the Kerr Plant (MPC Br. 40-43)*

At pages 40-43 the Company argues that the Commission's (Van Scoyoc's) method of allocating earnings to the Kerr plant is arbitrary. It says (p. 40) that the Company's electric revenues were allocated to its three main functions (Power Supply, Transmission and Distribution) based on the Company's relative investment in each, whereas once the Power Supply segment of revenue was thus segregated, that segment was then further allocated to the various power plants (Kerr, Thompson Falls, Bird steam plant, etc.) according, not to investment in each, but to the power each produced. This meant, the Company argues, for instance that none of the Power Supply revenue is assigned to a steam plant in a year when it is idle, which exaggerates the revenue assigned to a plant which does produce power that year.

The goal is to show what portion of the Company's net operating income is attributable to the Kerr plant, and that is a direct function of how much power it generates, and not necessarily the investment in it. In a year when the steam plant is idle, it generates no income at all. The *only* meaningful basis of allocation of Power Supply revenues was on the relative amount of power each facility generated, and this is what Van Scoyoc did, and the Commission agreed this was reasonable.

The steam plant example cited by the Company is an anomaly, and not illustrative of any defect in Van Scoyoc's method. The annual contribution of energy by the steam plant was always small, averaging only about 5% of the total energy in the years 1958-64. Exh. CT 5, Sched-

ule 2, Sheet 5 (R. 1555). Moreover, the steam plant was idle only one of seven years (1960) and in most other years produced its usual share of the power.

Incidentally, the Company says (p. 40) that Van Scoyoc assigned "revenues" to groups of assets in proportion to investment in each. This is not true. He so assigned "operating income," not "revenues." Revenues are before expenses; operating income is after. See Exh. CT 5, Sched. 4, Sheets 1-7, last line, and R. 470.

The Company says (MPC Br. 41) that it was arbitrary to assume that the Company's rate of return on Kerr plant investment was different from the rate of return on dollars invested in other Company assets. This sounds as if the Company would like to pay the Tribes a rental based on the Company's system-wide profit, rather than on the actual profit it makes from the Kerr plant. This, however, would not accord with the language of the license, which requires a rental based on "... the commercial value of the tribal lands involved . . . ."

Using the Company's analogy to a fleet of trucks (p. 42), the Company wants to rent a tractor-trailer rig from the Tribes, and pay only the rent for a pickup truck, on the ground that it does not allocate its profits to any one of the trucks it rents, and the average truck rental it is accustomed to pay is that of a pickup truck. The Tribes would not wish to rent their rig on that basis.

The Tribes' ears are deaf to the Company's plea that it is a regulated utility, whose return is based on investment. This does not mean that others should sell their products to the Company at reduced prices. The Tribes note that the Company is and consistently has been one of the most profitable electric utilities in this country. See p. 3 above. Its return on investment steadily increased from 8.9% to 11.2% over the years 1959 to 1964. CT-5, Sched. 6, Sheet 2 (R. 1555). Perhaps this handsome increase, well in excess of the allowable return for

the Company's system-wide operations, see note 1 above, was due to the increasingly great bargain the Company enjoyed in renting the power dam site responsible for a quarter of its electric revenues.

2. *The Commission's Treatment of Hungry Horse Benefits (MPC Br. 43-45)*

The Company correctly notes that the present power output of the Kerr plant results in considerable measure from use of releases of stored water from the Hungry Horse reservoir upstream. The Company complains that the proportion of Power Supply income which Van Scoyoc allocated to the Kerr plant is thus "greatly inflated," because the basis of the allocation was relative power generation, and the Hungry Horse water releases increased the output of Kerr.

The Kerr project was a great bargain for the Company to build—the high, narrow canyon meant a high head of water could be obtained with relatively little concrete needed to span the two walls. And the Company invested nothing at all to obtain the bare site or the Indian half of the Flathead Lake reservoir (because it did not buy them, it rented them). The only investment it had to make was in the flowage easements around the non-Indian half of Flathead Lake, see note 9 above, and, of course, in the dam proper and its works.

And later in 1951, the value of the site was enhanced even further, *at no investment cost whatever to the Company*, when the Hungry Horse dam upstream greatly increased the water available for generation at the Kerr site in low-water months. See p. 7 above. The Company paid for these benefits, of course, but through current expenses (fully recaptured through rate regulation) not through investment. It is true that the Company did invest in a third generator in order to take advantage of the Hungry Horse benefits, and to that extent its investment in Kerr was increased. But the Company still ob-

tained most of the advantages of the site through current expenses, not investment.

The fact that Hungry Horse contributes to the power output at Kerr does increase the Company's power revenue allocated to Kerr, but rightly so. The Company has no legal interest in Hungry Horse (as it does in the north half of Flathead Lake), and therefore has no basis for excluding the Hungry Horse benefits from the Tribes' share of the annual net operating income of Kerr. The Hungry Horse benefits are external to both the Tribes and the Company, in the same sense that the natural stream flow is so, and therefore the benefits should be allowed their full natural contribution to the profitability of the Kerr Dam site.

At page 44, the Company says that the "Commission" (i.e., Van Scoyoc) excluded the cost of headwater benefits from Hungry Horse in arriving at the costs of Kerr plant, although a substantial part of the revenues attributable to Kerr based on relative power output arise from Hungry Horse benefits.

Headwater benefits are valuable because they assure a downstream project of additional flow during low water periods. As was required, Kerr made payments to the Government for the Hungry Horse benefits. But then in turn Kerr realized (from downstream projects) revenue from the storage and regulation of the waters in Flathead Lake, which increased the output of the downstream generating plants.

Van Scoyoc disregarded headwater benefits altogether, both payments by the Company to the Government for Hungry Horse storage, and payments to the Company from downstream projects, on the grounds that he did not have available the necessary information to give them consideration in his study. R. 478-80. However, the Secretary of the Interior produced evidence that the Company's net profit from these transactions was actually almost

\$100,000 per year. Exh. S-7, R. 1628. Had Van Scoyoc been aware of this additional profit he would have increased his recommended annual charges by \$50,000. R. 480, 515.

In the footnote on p. 44, the Company says that Van Scoyoc, although intending to disregard headwater payments both to and by the Company, actually included payments to the Company in the Company's revenues.

This is not true. The payments shown on the schedules referred to by the Company are not included in the revenue from sales of electricity applicable to Power Supply, Exh. CT-5, Sched. 2, Sheet 4, line 1 (R. 1555). Moreover, the items of Other Electric revenue on line 9 of that schedule do not include headwater benefit payments. The Company has misconstrued the use by Van Scoyoc of the Other Electric revenue amounts on Exh. CT-5, Sched. 6, Sheet 2, and Sched. 4, Sheets 1-7 (R. 1555). No portion of headwater benefit payments was included in the revenue attributed to the Kerr project.

The Company complains (MPC Br. 44) that its payments to Hungry Horse for water releases are supposed to be all the Company has to pay for those releases, and to make the Company pay again for these waters through increased rental payments to the Tribes is against statutory policy.

The answer to this, of course, is the Company is not paying twice for the same waters. It is a simple fact that the existence of Hungry Horse has made the Kerr site more profitable, as shown by the record in this case, and the more profitable the site, the more valuable it is. The rental payments made by the Company are payment for that value, not second payments for the Hungry Horse water.<sup>33</sup> The Company could as well complain that it pays

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<sup>33</sup> It may also be observed that the Company's witness Seymour specifically attributed to the Tribes a share of the additional value of the Kerr plant site due to the upstream Hungry Horse water releases. R. 705-6.

twice for its project personnel—once through the pay envelope and again through the charges to the Tribes which were increased due to the greater productivity of the personnel.

The Company made a similar argument in the *Third Unit* case, and this Court held that the headwater payments question

“... is not relevant, unless it appears that the failure to consider them made unreasonable the Indian rentals fixed by the Commission. This does not appear.” (298 F.2d at 340.)

### 3. *The Profitability Method of Calculating Annual Value (MPC Br. 45-49)*

The Company says (MPC Br. 45-46) that the Act and the license explicitly provide for what is to be done with the Company's excess profits, and therefore the Commission is not authorized to turn some of those profits over to the Indians. We wonder if the Company makes this same argument to the work force at Kerr when their contract comes up for renegotiation and they ask for increased wages in recognition of increased productivity.

The Company likes to characterize the profitability method of arriving at the commercial value of the site as “profit-sharing.” The Commission correctly answered this by pointing out that the license, to which the Company agreed, calls for the annual charge to be based on the “commercial value” of the site “for the most profitable purpose.” FPC Op. R. 10079-80. If readjusting the annual charge on the basis of the “commercial value” for the “most profitable purpose” is “profit sharing,” it is a form agreed to by the Company.

In the footnote on page 46, the Company says that the profitability method is a measure of the Company's earning power and efficient management and operation rather than the earning power of the Indian lands. Put the Company in the gold mining business, give it a lease to



exploit a rich Indian gold mine, substitute "gold mine" for "lands," and the inaccuracy of the Company's statement becomes apparent. The correct statement is that the resource (power site or gold mine) has a profit potential, which may be reached, or fallen short of, according to the skill and strength of the lessee. The rents for the right to exploit the resource theoretically should be based primarily on the potential profit assuming prudent management under contemporary conditions, not the lessee's actual profits. The Company's actual net operating income from this power site is evidence, accepted by the Tribes, of the potential profit therefrom. The Commission alluded briefly to this principle, R. 10080.

*C. The Commission's Determination of the Tribes' Proper Share in the "Excess Profits" (MPC Br. 49-52)*

The Company's complaint here is that the Commission increased the Tribes' share of the commercial value of the site from 25% to 42.13%.

So far as this Court is concerned, the only question is whether the rental set by the Commission, \$950,000, is reasonable. If it is, then the percentage used by the Commission as one of its subfactors in arriving at the \$950,000 is not relevant. As this Court said in the *Third Unit* case,

" . . . the statute is silent as to how Indian rentals shall be computed. So, the only question is whether the rental fixed by the Commission is reasonable. Whether headwater benefits payments by the licensee should have been considered is not relevant, unless it appears that the failure to consider them made unreasonable the Indian rentals fixed by the Commission." (298 F.2d at 340.)

The same principle applies to the percentage which happened to be used—it is irrelevant unless it made the overall result unreasonable.

In any case, the percentage was eminently reasonable. The Tribes would have been given 50% of the commercial

value of the site if the Company's only contribution had been to build the Kerr plant and its works. But the Company also had an investment in flowage rights in the north half of Flathead Lake, which Sporseen, and eventually the Commission, felt warranted reducing the Tribes' share from 50% to 42.13%. Considering the substantially greater strategic value of the dam site, compared to Flathead Lake,<sup>34</sup> and considering the relatively small cost to the Company of its interest in the north half of the lake (see note 9 above), a discount of that size was reasonable.

The Company (MPC Br. 51) says "no reason whatever is given for crediting the Tribes with all of" the Hungry Horse water. Sporseen did not assign all of the Hungry Horse value to the Tribes. He gave them credit for half of it, and the Company credit for the other half. R. 260, 275; FPC Op. R. 10085.

One could even reasonably argue (we do not) that the Tribes should have *all* of the profits over and above a reasonable return on the Company's investment, since a reasonable return is all a regulated utility is supposed to have. Apparently just this view was taken by the Bureau of Indian Affairs in the hearings on the 1928 Act, see p. 4 above, which authorized the Commission to issue licenses for power development on the Flathead Reservation. A Bureau official testified that "the *entire net proceeds* from this power development on the Flathead Reservation should go to the Flathead Indians."<sup>35</sup>

<sup>34</sup> Flathead Lake was important, of course, but once the dam was built at the site, a reservoir would automatically have been formed *somewhere*. As it happened, Flathead Lake was already there, and so the Company did not have to invest as much in flowage easements as it otherwise would have. But the critical value of the site was in the narrow, high, solid, rock-walled canyon which itself offered not only water head for the development of power, but also the opportunity for economical control and regulation of the vast storage of Flathead Lake. The analogy is to a coal deposit near a railroad. The proximity of the railroad is important, but the critical value is in the deposit.

<sup>35</sup> Emphasis added. *Hearings Before Subcommittee of Senate Committee on Appropriations, Interior Department Appropriation Bill*,

In any event, the Commission's over-all concern was with reasonableness of the rental, not with precisely what percentage should be used. After adopting Sporseen's 42.13%,<sup>36</sup> and coming up with a rental of \$950,000, it said:

"We consider this end result reasonable. It is certainly much closer to reality than the existing annual charges of \$238,375, or the charges Montana Power recommends herein." (FPC Op. R. 10086)

***D. The Commission's Readjustment of the "Third Unit" Charges (MPC Br. 52-55)***

The Company argues (MPC Br. 52-55) that the Commission erred in including the so-called third generating unit in determining readjusted charges. The Company claims that additional rentals were ordered by the Commission in 1959, and sustained by this Court on the theory that a "new license" was required for the third unit. The Company concludes that annual payments under this new license—finally approved in 1962 by this Court in the *Third Unit* case—are to be continued for a period of twenty years which has not yet expired.

This line of reasoning will not withstand analysis. Section 10(e) of the Federal Power Act provides when referring to readjustment, that:

"... such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at pe-

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*Fiscal 1929*, 70th Cong. 1st Sess. at 19-23, 46-47, 53. Cited in *Confederated Salish & Kootenai Tribes v. United States*, 181 Ct.Cl. 739 (1967).

<sup>36</sup> It is interesting to note that in 1930, at the time the initial 20-year charges were being negotiated, the Commission proposed a division of the interest in the entire project between Indian and public interest (i.e. to be collected by the Company and passed on to the public) on a basis of 46.5% to the Indians. *Third Unit* case, 22 F.P.C. 502, 512 (1959), derived from Scattergood Report, Sen. Doc. 153, 71st Cong. 2d Sess. (1930), pp. 60-61, R. 8290-91.

riods of not less than ten years thereafter upon notice and opportunity for hearing: . . . ." (Emphasis added)

The quoted provision ties the readjustment of annual charges to *the project* itself and not merely to some of its *project works*;<sup>38</sup> as a result, since the project includes three generating units, all of which were in operation twenty years after the project commenced commercial operation, all three units must be considered in determining the reasonable readjusted annual charge.

The Commission correctly rejected the Company's argument (R. 10073):

"The most reasonable conclusion is that the readjustment of annual charges should be undertaken for the project in its entirety and not with respect to the time each generator began commercial operations. The logic of Montana Power's argument requires separate determinations of the rentals applicable to the first and second units, which were placed in service ten years apart. Not even Montana Power contends these two units comprise separate projects."

#### IV. Readjusted Charges May Be Retroactive in Application (MPC Br. 57-60)

The language of Section 10(e) of the Federal Power Act is plain—annual charges may be readjusted by the Commission "*at the end* of twenty years after the project is available for service," (emphasis supplied), and not at the end of that period plus any number of years the proceeding may be stalled by the Company or mired by circumstances or the administrative process.

As the Commission held (R. 10070):

"The purpose of Section 10(e) both of the Federal Water Power Act and the Federal Power Act was to

<sup>38</sup> As discussed in detail in the *Third Unit* case, 298 F.2d at 339; see also *Lake Ontario Land Develop. v. FPC*, 93 U.S. App. D.C. 351, 212 F.2d 227, 232 (1954), *cert. den.*, 347 U.S. 1015.

provide that the Indian proprietors of the land would be compensated for use of their lands by reasonable rentals thereon. It would be grossly inequitable to allow a tenant to occupy premises during a dispute over the establishment of a fair and reasonable rental charge if such charge were not effective during the full period of the dispute. The owner is entitled to his proper rental for the period of occupancy although the final determination as to the proper amount may not be reached until long afterward. Indeed, it is not difficult to imagine a situation where the final determination may not be reached until after the premises have been vacated. The logical extension of Montana Power's argument is that the owner would be entitled to no readjusted rents in that case."

The Company argues (MPC Br. 58), quoting Article 30(A) of the license, that existing charges are to remain applicable until

"... adjustment of the annual charges payable hereunder shall have been effected . . . ."

But the language quoted by the Company is misconstrued totally. Certainly the Company must continue to pay currently applicable charges until readjusted charges are determined. But all this means is that, during that period of time between which a petition for readjustment is filed and readjusted charges are actually ordered by the Commission, the Company is not to enjoy the free use of the valuable Kerr site."

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"The Company was responsible for a significant part of the delay in this case, though most was due to the ordinary exigencies of the administrative process. The chronology of events, excerpted from Appendix E of the FPC Staff brief filed herein Mar. 8, 1966: May 19, 1959, Tribes filed petition for readjustment. Case held up till Jan. 25, 1962, while *Third Unit* case litigated. May 7, 1962, letter from Company to FPC expressing hope that parties can agree on revised charges. Dec. 28, 1962, letter from FPC to Company inquiring as to progress. Jan. 13, 1964, letter from Company to FPC requesting meeting re agreeing on charges. Jan. 24, 1964, demand by Tribes for hearing. Mar. 29, 1965, hearing set for July 20, 1965. July 7, 1965, hearing postponed to Oct. 12, 1965. The hearing began Oct. 28, 1965.

Once the Commission determined to make the Tribes whole by retroactive application of the redetermined charge, an adjustment was "effected" within the meaning of Section 30(A). At this point the old charges, paid by the Company pending determination of the proper charges, were no longer applicable, thus making the Company liable for the difference between what it paid and what it ought to have paid, plus interest.

The Company<sup>40</sup> disputes the Commission's statement (R. 10070) that the Company could have softened the impact of retroactive application of the redetermined rates by setting up a reserve account. The Company avers (p. 59) it could not have anticipated "an increase of the magnitude contemplated here . . . ." This is nonsense. We think, in view of the enormous profits derived by the Company from this project and in view of the low depression-set charges previously payable, it would have been prudent and proper for the Company to anticipate very substantial increased liability under the license by setting up an appropriate reserve account in 1959. Under the Commission's determination of the annual "commercial value", the company has been making an excess profit, over and above a reasonable return, of \$2,250,000 each year from this site since at least 1958. It is apparent that the obsolete rate, which the Company enjoyed for 20 years, should not in equity be continued a day longer

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<sup>40</sup> We dispute the Company's assertion that this was a matter for the Commission's discretion. The statute is plain. If a readjustment is to be made it is to take place at a specific point in time—"at the end" of the twenty year period. The Commission had discretion as to whether a readjustment should be allowed but not as to when it should go into effect.

As stated by the Commission (R. 10070):

"Where, as here, the claim for readjustment is made contemporaneous with the expiration of the statutory period, we conclude that the statute contemplates that any readjustment ultimately determined becomes effective upon the date which marks the completion of the first twenty years after the project is available for service."



than the statutorily required 20 years, which expired in May, 1959.

We note that the Commission made the annual charges retroactive in the *Third Unit* case, 25 F.P.C. at 224.

**V. The Commission Did Not Err in Holding That 6 Percent Interest Was Due on the Retroactive Charges (MPC Br. 61-63)**

The Company asserts (MPC Br. 61) that interest is not due in this case, relying on the "general common law and statutory rule [which] denies interest on an unliquidated claim . . . ."

First, the rule is nowhere near as certain as the Company asserts. While various jurisdictions differ as to the allowance of interest on an unliquidated claim<sup>41</sup>—often as a result of varying state statutes on the point—there is considerable authority permitting the award of interest, in the discretion of the Court, where justice and fairness so require.

Thus in *Montgomery Ward & Company v. Collins Estate, Inc.*, 268 F.2d 830 (4th Cir. 1959)—involving a situation analagous to the one presented here—a claim was made for back rentals, the amount of which was sharply in dispute. The Court ruled that it was proper to award 6 percent interest on the rentals ultimately found to be due.

The rationale of the rule was succinctly stated by the Supreme Court in *Miller v. Robinson*, 266 U.S. 243, 257-258 (1924), where the Court awarded interest on an unliquidated claim arising from a breach of contract to purchase ore:

"One who has had the use of money owing to another justly may be required to pay interest from the time the payment should have been made. Both in law and in equity, interest is allowed on money due. *Spalding*

<sup>41</sup> See generally Annotation, 36 A.L.R. 2d 344.

v. *Mason*, 161 U.S. 375, 396. Generally, interest is not allowed upon unliquidated damages. *Mowry v. Whitney*, 14 Wall. 620, 653. But when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages."

The Company would distinguish the *Miller* case and its progeny on the ground they involve either breaches of contract or actions in tort. The Company asserts (MPC Br. 61) there is no "breach of the license" in the instant case.

Of course, the Company in a technical sense has not breached its license. But if the license is to be regarded as a contract—as the Company regards it when it suits its purposes—then the claim of the Tribes here amounts to a claim under the contract for disputed rentals, not essentially different from the claim for disputed rentals involved in the *Montgomery Ward* case, *supra*.

The Commission has customarily ordered 6 percent interest in rate refund cases, *Wisconsin and Michigan Power Company*, Opinion No. 432, 31 F.P.C. 1445, 1462 (1964)—situations which the Commission deemed "closely analogous" to the present case (R. 10071). Contrary to the statement in the Company's brief, the award of 6 percent interest did not turn on the fact that the Wisconsin Company was a "wrongdoer". The Examiner in the Wisconsin case relieved the Company of paying interest because he found that the delay in the case was not attributable to the Company. The Commission ruled that this was irrelevant, holding: "The excess revenues extracted from Intervenor have been available to Wis-Mich and unavailable to Intervenor. The Company should be required to pay for the value of this use." (31 F.P.C. at 1462) So here Montana Power Company should not be entitled to enrich itself at the expense of the Tribes; it should pay going rates for its use of tribal moneys. We note that the Commission allowed interest in the *Third Unit* case, 25 F.P.C. at 224.

In attacking the 6 percent *rate* of interest determined by the Commission the Company asserts that the Indians only lost 4 percent by the delay. While the Company would be correct in stating that the Indians would only have received 4 percent interest for their funds if they had been deposited in the Treasury (45 Stat. 200, 213 (1928)) the Company ignores the fact that the funds would not have been left in the Treasury. Funds of this sort are usually quickly withdrawn from the Treasury after deposit to meet the general expenses of Tribal government or for per capita distribution.<sup>42</sup>

**VI. The Tribes Are Entitled to an Additional Rental of \$42,000, Representing Headwater Benefits Arising from Flathead Lake Storage**

The Commission evidently failed to give consideration to a distinct element of value attributable to the tribal lands and waters. Flathead Lake storage amounts to 1,217,000 acre feet, and because of this storage the Company receives, pursuant to Section 10(f) of the Act, value in kind (kilowatt hours) and in cash from downstream projects benefitting from Flathead Lake storage releases. Thus, Flathead Lake storage is of commercial value to the Company. Therefore, what that storage contributes by net headwater benefits should have been considered as an increment of value for purposes of readjusting the annual charge. Van Scoyoc testified that he believed commercial value included headwater benefits, and that he would have included such net benefits in his calculations if he had had the requisite figures (R. 480, 515).

<sup>42</sup> Under the provision of the Act of June 24, 1946, 60 Stat. 802, the Tribes have unusually broad power to utilize tribal funds, subject only to the approval of the Secretary of the Interior and the requirements of the tribal constitution. For example, pursuant to this authority, \$750,000 was recently withdrawn from the Tribe's account in the Treasury and put at 6¼ percent interest in three different Banks (\$250,000 in the First National Bank of Sioux City, Iowa; \$250,000 in the First National Bank of Minneapolis, Minnesota and \$250,000 in the Continental National Bank of Englewood, Colorado).

The requisite figures were available at the trial, although not when Mr. Van Scoyoc made his calculations. Exh. S-7, R. 1628. They showed that Flathead Lake storage earned the Company an additional net of \$99,973 each year in headwater benefit payments. Dividing this between the Tribes and the Company on a basis of 42.13 percent to the Tribes, as the Commission did as to the other values, produces \$42,119 per year, which may be rounded to \$42,000. This figure should have been added to the annual charges.

To the extent that this Court accepts the decision of the Commission as based on substantial evidence, we do not press the headwater benefit point. However, if the Court should have occasion to weigh the evidence behind the Commission's decision, the headwater benefit profits must be considered also.

#### CONCLUSION

For the foregoing reasons the order of the Federal Power Commission should be affirmed.

Respectfully submitted,

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CHARLES A. HOBBS

*Counsel for the Tribes*

WILKINSON, CRAGUN & BARKER  
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JERRY C. STRAUS

*Of Counsel*

September 16, 1968



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United States Court of Appeals  
for the District of Columbia Circuit

FILED MAR 10 1972

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*Nathan J. Paulson*  
CLERK

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No. 21,904

THE MONTANA POWER COMPANY, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent

CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA,  
SECRETARY OF THE INTERIOR, Intervenors

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On Petition to Review an Order  
of the Federal Power Commission

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PETITION OF THE MONTANA POWER COMPANY  
FOR REHEARING AND SUGGESTION  
OF EN BANC HEARING THEREOF

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The Montana Power Company hereby requests re-  
hearing of this Court's judgment of February 17, 1972,  
and suggests, for the reasons stated below, that an en  
banc hearing would be appropriate.

The case involves the readjustment of the annual rentals due to the respondent Tribes by the Company by reason of the fact that the Tribes' Reservation includes certain of the lands involved in a power project of the Company. The license agreement for the project issued by the Federal Power Commission fixed the annual rental for the first 20 years of operation at \$175,000 (increased by \$63,375 in 1954 when a third generating unit was added). The license further provided that the annual rentals might be readjusted at the end of the 20-year period, and at 10-year intervals thereafter.

The Commission, after a hearing, ordered the annual rentals "readjusted" to \$950,000, retroactive to 1959. The petition to review is from that order.

A. The recent history of  
this proceeding

The course of the litigation in this Court has demonstrated both the difficulty and the importance of the issues which it presents.

The Company's petition to review raised two basic issues: first, whether the Company's contract right in its license agreement to have the readjustment decided by arbitration deprived the Commission of jurisdiction; and second, whether, if the Commission had jurisdiction, its decision was correct.



Both issues were briefed and argued to the Court in December 1968. On June 26, 1969, the Court, with one judge dissenting, reversed the Commission's order, holding that the arbitration agreement deprived the Commission of jurisdiction. Petitions for rehearing en banc were granted, limited to the arbitration issue, and the prior decision was reversed, in a 4-3 decision. Montana Power Co. v. Federal Power Commission, \_\_\_ U.S. App. D.C. \_\_\_, 445 F.2d 739 (1970). A petition for certiorari was denied (400 U.S. 1013).

Thereafter, the case was again argued to the original panel (with Judge Fahy substituting for Judge Burger) on the issues relating to the merits of the Commission's order. The decision from which this petition for rehearing is sought is the decision by that panel.

B. The decision

The three opinions of the Court on the merits continue to demonstrate both that the issues are important and difficult, and that it is entirely appropriate for the questions at issue to be heard and resolved by the Court en banc. The opinion for the Court by Judge Fahy dealt with each of the specific objections which the Company had advanced to the Commission's order. One of these -- the rate of interest to be charged on the retroactive

payments -- was sustained, and the Commission's order modified accordingly; the others were rejected. Judge Tamm, concurring in part and dissenting in part, would have sustained two of the Company's objections, as more fully explained below. Judge Leventhal, also concurring in part and dissenting in part, would have sustained, in part, another Company objection.

Thus, unless a rehearing is granted, preferably en banc, there will exist the anomaly of a Commission decision being enforced against the Company despite the fact that two of the three judges believe it is in error and substantially so. Although the processes of appellate adjudication may on occasion compel such a result, it should be avoided whenever possible. An en banc hearing of the merits of the case -- as was had on respondent's suggestion on the issue as to jurisdiction -- may do so.

Moreover, there are serious difficulties with the opinion of the Court. This petition cannot appropriately deal with each of the issues at length, but some warrant comment.

1. The Federal Power Act (Sec. 10(e)) states that the rentals fixed at the beginning of the license term "may . . . be readjusted by the Commission" at the end of 20 years. The Commission, nonetheless, insisted that the original, negotiated annual rental could be

ignored, and that "the entire analysis must be made de novo" (R. 10075). The opinion of the Court, accepting that conclusion, states that "it is more reasonable to interpret Section 10(e) to permit the Commission to re-determine the rentals than to be bound to an earlier standard" (Op. pp. 6-7).

As Judge Tamm, in his dissent, points out (Op. p. 22), "readjust" -- the word used in the statute and in the Company's license -- is not the same as "redetermine" -- the word used by the Court. "Readjustment," as this Court has stated in California-Oregon Power Co. v. Federal Power Commission, 99 U.S. App. D.C. 263, 239 F.2d 426 (1956), imports findings that the original annual rate is unreasonable, why it is, by how much, and a new reasonable rate. It does not suggest that when the Company has entered into a 50-year contract and has made substantial investments on the strength of that contract, the terms it negotiated and accepted can be ignored and a new and different basis can be substituted in "readjusting" the annual payment. And this is particularly true, as Judge Tamm also points out (Op. p. 23), when the "de novo" basis adopted by the Commission was one that had been expressly rejected as a basis for determining the annual rentals in the negotiations leading to the original license. Moreover, as Judge Leventhal notes in another connection (Op. p. 29), the

Commission has announced that it will apply a precisely contrary rule when considering the second "readjustment" at the end of another ten years -- that the \$950,000 "will continue as the lawful charge under Section 10(e) until demonstrated to be inappropriate" (JA 361).

We submit that the Court, in permitting the Commission to "redetermine" rather than to "readjust" the annual payment, as required by the license agreement, ignored not only the intentions of the parties but also the prior decision of the Court. It is fair to add that this does not mean that the Commission would be required to accept the original rental. There had been changes, which would have warranted some increase -- but not one of 400 per cent.

2. The Company's license agreement specifies, in Article 30(A)(3), that the original negotiated rate shall continue "until adjustment of the annual charges payable hereunder shall have been effected pursuant to the provision of paragraph (D) of this Article 30" (R. 8860). The Commission, notwithstanding, made the "redetermined" \$950,000 annual charge, which it "effected" in 1967 pursuant to paragraph (D),<sup>\*/</sup> retroactive to May 20, 1959. The opinion of the Court found "no reason to disagree with the Commission's interpretation of the statute" (Op. p. 10).

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<sup>\*/</sup> Paragraph (D) provided for arbitration, but the Court in its previous en banc opinion held that the Commission had jurisdiction to make the decision.

As Judge Leventhal, dissenting on this point, spells out, there are many reasons to disagree. The Court is simply in error in characterizing the Commission's action as an "interpretation of the statute." The issue is as to the interpretation of the license agreement, on which the Company is entitled to rely. Moreover, retroactivity only to the date of the Commission's notice of hearing (1965), which Judge Leventhal finds proper, avoids any possibility of a premium for litigating delay. In addition, full retroactivity makes the payments for the years 1959 to 1962 directly inconsistent with the decree of this Court in 1962, which is now res judicata, that \$63,375 is the reasonable annual charge for the third generating unit. Montana Power Co. v. Federal Power Commission, 112 U.S. App. D.C. 7, 298 F.2d 335 (1962).

The Court is also seriously in error in stating that reducing or eliminating retroactivity "is not required in the interest of fairness to the Company" (Op. p. 10). The Court recognizes that it was not until the Examiner's decision in August 1966 recommending annual charges of \$850,000 -- increased in 1967 by the Commission to \$950,000 -- that the Company was aware of the possibility of a massive increase -- and was even in a position to argue for a huge contingency reserve to protect itself. Moreover, the Court is scarcely fair in charging the Company with the delay from the third

unit litigation by saying it was "initiated by the Company" (op. p. 11). On the contrary, the Company was resisting -- albeit unsuccessfully -- a claim for additional rental. Even the Commission made no such charge.

We submit that the maximum retroactivity which would not constitute an abuse of the Commission's discretion -- if it had discretion -- was to the date of the Examiner's report in 1966, and that the Court's sanction of full retroactivity penalizes the Company many millions of dollars.

3. The opinion of the Court is particularly deficient in respect to three aspects of the manner in which the Commission arrived at the figure of \$950,000 for the annual rental.

The annual rental was calculated by the Commission in two steps. First, it determined an annual "value" of the project. Then, second, it determined what portion of that annual "value" was to be allocated to the Tribes, considering that the lands involved in the project were owned half by the Indians and half by the Company, and that the Company had contributed all of the investment.

a. As to the determination of annual "value," the Court has allowed the Commission to construct a rate base and reasonable rate of return for the Company which is substantially different from the rate base and

rates fixed by the Montana Public Service Commission. The Montana Commission has express statutory jurisdiction to regulate 97 per cent of the Company's rates, which apply to its intrastate sales (16 U.S.C. §§ 812, 813, 824).

Although the Company tendered the Montana Commission's figures at the hearing (Co. Exh. 34, R. 1718), the Federal Commission proceeded to its own determinations, and thus to determine that there were "excess profits" to be shared by the Company with the Tribes. Had the Federal Commission used the rate base determined by the Montana Commission, the annual "value" of the project would have been reduced by almost half (Co. Ex. 34, R. 1718). The Montana Commission has the statutory responsibility, it has exercised it (R. 502-503), and its jurisdiction to determine the Company's rate base and reasonable rate of return should have been respected by the Federal Commission and the Court.

b. Having determined -- erroneously -- the annual "value," the Commission then proceeded to the calculation of the Tribes' share of this "value." In reviewing this aspect of the Commission's action, the Court has either confused, or misunderstood, or both, the Commission's calculations, and for that reason failed to address the real issue.

The Company urged that the Commission adopt the same method of allocation as had been approved by this Court in the earlier Third Unit case (Montana Power Co. v. Federal



Power Commission, supra): "value" had first been divided 50-50 based on the Company's contribution of all the investment (the investment/land division). Then the land contribution of 50 per cent was further divided 50-50 between the Tribes and the Company, based on their respective shares of the ownership of the land involved in the project. This produced a 25 per cent share of the annual "value" for the Tribes.

Here the Commission increased the Tribes' share from 25 per cent to 42.13 per cent. It accepted the first 50-50 division -- the investment/land division -- and that is not in issue. It rejected, however, the basis on which the second 50-50 division had been made in the Third Unit case -- that all the land involved in the project made an equal contribution, since all was necessary to the project. Instead, it made this second division on the basis of the waters which various parts of the project lands "contributed" to the turbines. While we believe this is no more than a device to increase the Tribes' share, we believe the Court failed to understand and reject, as it should have, these water allocations.

In its calculations, the Commission divided the waters into three categories: the waters in the natural flow of the river, the waters in the project reservoir, and the waters from a government dam and reservoir at Hungry

Horse, upstream from the project -- not a part of the project, but contributing to the power output of the project by further regulating the water flow. The amounts of water (expressed in megawatt months -- MWM) attributed to each is not in dispute:

Natural stream flow	161 MWM
Reservoir	376 "
Hungry Horse	<u>657</u> "
Total	1,194 MWM

The Commission then assigned these waters as between the Company and the Tribes. All of the natural stream flow -- 161 MWM -- was assigned to the Tribes, because the Tribes' 50 per cent of the land happened to include the land on which the dam itself is situated.<sup>\*/</sup> The reservoir waters were assigned half to the Tribes and half to the Company, based on the 50-50 ownership of the land underlying the reservoir. All the Hungry Horse waters were assigned to the Tribes, with no explanation. This assigns to the Tribes 161, plus 188 (half of 376) plus 657, or 1,006 MWM -- 84.26 per cent of the total of 1,194 MWM. This, divided by two to represent the land/investment division, gives the figure used by the Commission -- 42.13 per cent.

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<sup>\*/</sup> The assumption underlying this assignment is that the project could have been operated without the reservoir as a "run of the river" project. This assumption, accepted by the Court (Op. p. 16), is flatly contrary to the record (R. 275-276; R. 293).

The Commission assigned no reason for the assignment of all of the Hungry Horse waters to the Tribes, either in its opinion or in its briefs to the Court. Indeed, it could not do so. The Hungry Horse water is contributed by Hungry Horse, not the original river. Its usefulness to the project would be seriously curtailed were it not for the project reservoir.

The opinion of the Court, however, misunderstanding the calculation, asserted that all of the Hungry Horse waters were not assigned to the Tribes (Op. p. 17). It clearly confused the second -- water -- allocation with the first -- land/investment -- allocation, and by referring only to the latter assumed that the Hungry Horse waters had been allocated 50-50. The land/investment division, however, had nothing to do with the water allocation. For example, on the Court's rationalization, the Tribes were assigned only half of the run-of-the-river waters; yet the Commission asserted that those waters were to be credited entirely to the Tribes because they owned the land underlying the dam itself.\*

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\*/ Judge Leventhal appears to disagree with the conclusion of Judge Fahy that the Hungry Horse waters were allocated on a 50-50 basis between the Company and the Tribes (Op. p. 31). He attempts, however, to construct a justification on the ground that the Hungry Horse water merely flowed through the reservoir and could therefore be treated like run-of-the-river water -- a justification not made by the Commission and one which overlooks not only the role of the project reservoir but also the fact that it is the Company's system as a whole, not just this project, which makes possible the full realization of the Hungry Horse reservoir (See Op. p. 26).

As Judge Tamm, who dissented on this issue, points out (Op. p. 27), this error by the Court is very substantial. If the Hungry Horse waters were divided 50-50, the Tribes' share would be reduced from 42.13 per cent to 28 per cent, and the annual rental from \$950,000 to \$631,000.

The Court's error as to Hungry Horse waters is compounded by its approval of the action of the Commission in excluding from consideration in determining the income of the project the very large annual amounts (more than \$670,000 per year in the relevant years) which the Company was required by Section 10(f) of the Act to pay to the United States for "headwater benefits" from Hungry Horse (R. 64-65). The alleged justification -- that "headwater benefits" paid to the Company from users downstream from the project were also excluded -- is simply wrong (CT Ex. 5, Sch. 6, Sheet 2, Col. 10, R. 1580; Sch. 4, Sheets 1-7, line 40, R. 1565-1571; R. 459). Since the Tribes' witness expressly stated that these payments were included (R. 479), we fail to understand why the Court found the record in this respect inadequate (Op. p. 19).

c. The Court has also taken a position flatly inconsistent with its earlier decision in the Third Unit case. In that case the Company, in opposing an additional annual charge because it had installed a third

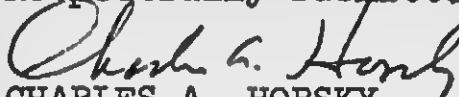
generating unit, argued that the project was all one project, for which the rentals were fixed for 20 years by the license agreement, and that instead of changing the rentals during that period the Commission should treat the third unit as a "changed circumstance" when the annual rental payments for the project were readjusted at the end of that period. The Commission, on the contrary, and this Court, sustained an additional annual charge during the 20-year period on the ground that the permission from the Commission to install the third unit was "a new and original license for the third unit" (Montana Power Co. v. Federal Power Commission, supra, 112 U.S. App. D.C. at p. 11, 298 F.2d at p. 339). The annual charges for a "new and original license," of course, are fixed by the statute (Sec. 10(e)) for a 20-year period, which for the third unit license expires in 1974.

Now, however, the Court permits the Commission to have it both ways. Contrary to its prior decision, the Court denies that the third unit was "a new and original license," and says it is "part of the Kerr project" (Op. p. 8), and permits the Commission to readjust the annual payment for the third unit in 1959. This is not only unfair to the Company -- one of the decisions against it has to be wrong -- but it makes a nullity of a prior decision of the Court.

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We submit, therefore, that a rehearing, preferably en banc, should be granted. The issues are clearly no less important than those which the Court heard en banc at an earlier stage of this case. Moreover, the Court should attempt to ensure that, whatever decision it reaches, it should not be one where an order of the Commission is enforced despite the belief by a majority of the Court that it is seriously and substantially wrong.

Respectfully submitted,

  
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JOSEPH A. McELWAIN  
The Montana Power Company  
Butte, Montana 59701

March 10, 1972

CERTIFICATE OF SERVICE .

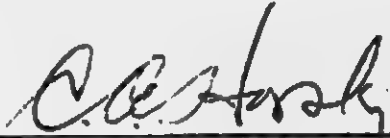
I hereby certify that I have today sent by first class mail, postage prepaid, copies of the foregoing Petition of the Montana Power Company for Rehearing and Suggestion of en banc Hearing Thereof, to counsel for all other parties in this proceeding, as follows:

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\_\_\_\_\_  
Charles A. Horsky

March 10, 1972





PETITION OF THE FEDERAL POWER COMMISSION  
FOR REHEARING AND SUGGESTION  
FOR EN.BANC CONSIDERATION THEREOF

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
for the District of Columbia Circuit

No. 21904

FILED JUL 7 1969

The Montana Power Company, Petitioner

v.

*Nathan J. Paulson*  
CLERK

Federal Power Commission, Respondent

The Confederated Salish and Kootenai Tribes of the  
Flathead Reservation, Montana; Secretary of the  
Interior, Intervenor

No. 21767

The Confederated Salish and Kootenai Tribes of the  
Flathead Reservation, Montana, Petitioners

v.

Federal Power Commission, Respondent

The Montana Power Company, Intervenor

On Petitions to Review an Order  
of the Federal Power Commission

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July 7, 1969

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21904

The Montana Power Company, Petitioner

v.

Federal Power Commission, Respondent

The Confederated Salish and Kootenai Tribes of the  
Flathead Reservation, Montana; Secretary of the  
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The Confederated Salish and Kootenai Tribes of the  
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On Petitions to Review an Order  
of the Federal Power Commission

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PETITION OF THE FEDERAL POWER COMMISSION  
FOR REHEARING AND SUGGESTION  
FOR EN BANC CONSIDERATION THEREOF

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The Federal Power Commission hereby requests rehearing of this Court's judgment of June 23, 1969, as explained by its opinion of June 26, 1969. The Court held that the readjustment of the annual charges paid by Montana Power for its use of tribal lands was not within the Commission's jurisdiction because of an arbitration

three years. The licensee was unable to meet either this schedule or conform to the terms of the original license. In 1936, after an extension granted by the Commission had expired so that the licensee could take advantage of the rights originally accorded it in 1930 only by further Commission action, the authorization was amended, at the licensee's request, to call for only two generating units with a total capacity of 154,000 hp. Subsequently, a third unit was separately licensed in 1961, as of 1954. This 78,500 hp. unit had been built and in operation since 1954 without the required authorization.

The original license, as issued in 1930, specified annual charges as compensation for use of the tribal lands and provided in Article 30(D) for readjustment by mutual agreement between the Commission and the licensee, with approval of the Secretary of the Interior or, in the absence of such agreement, by arbitration in the manner provided for in the United States Arbitration Act. At the time the license was issued, Section 10(e) of the Federal Power Act stated that readjustment for use of tribal lands should be in the manner prescribed in the license. Section 10(e) of the Act was amended in 1935, prior to the "amendment" which established the actual terms under which the first two units of the project were constructed and operated, to provide that the readjustment of such charges could be by the Commission at the end of twenty years after the project was available for service. Nevertheless, the majority's decision concludes that the arbitration provision of the 1930 license



IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21904

The Montana Power Company, Petitioner

v.

Federal Power Commission, Respondent

The Confederated Salish and Kootenai Tribes of the  
Flathead Reservation, Montana; Secretary of the  
Interior, Intervenor

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No. 21767

The Confederated Salish and Kootenai Tribes of the  
Flathead Reservation, Montana, Petitioners

v.

Federal Power Commission, Respondent

The Montana Power Company, Intervenor

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On Petitions to Review an Order  
of the Federal Power Commission

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PETITION OF THE FEDERAL POWER COMMISSION  
FOR REHEARING AND SUGGESTION  
FOR EN BANC CONSIDERATION THEREOF

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The Federal Power Commission hereby requests rehearing of  
this Court's judgment of June 23, 1969, as explained by its opinion  
of June 26, 1969. The Court held that the readjustment of the  
annual charges paid by Montana Power for its use of tribal lands was  
not within the Commission's jurisdiction because of an arbitration

provision in the 1930 license issued to Montana Power relating to some, but not all, of the project works involved in the readjustment proceeding.

The Court's split decision (Circuit Judge Tamm and then Circuit Judge Burger for the majority, Circuit Judge Leventhal dissenting) by precluding Commission readjustment even of charges for the third generating unit, is, we believe, in conflict with this Court's earlier decision in Montana Power Co. v. F.P.C., 112 AppDC 7, 298 F. 2d 335 (1962), the so-called Third Unit Case. While there is no explanation for extending the decision to the third unit for which no serious claim to a right of arbitration can or has been made, the Court's judgment would effectively preclude any forum from taking the third unit into account in readjusting Montana Power's charges. We believe that rehearing is necessary, at the very least to make clear the status of the readjustment of charges attributable to the third unit. Moreover, in view of the apparent conflict with the Third Unit Case, we suggest that en banc consideration may be appropriate.

The Commission, in the order reviewed by this Court, undertook to fix readjusted annual charges payable by Montana Power to the Indian Tribes for its use of tribal lands in connection with its operation of the Kerr Hydroelectric Project pursuant to the license authorizations obtained from the Commission. In 1930, the Commission issued the original 50-year license authorizing, inter alia, the construction and operation of three generating units aggregating not less than 150,000 hp., to be completed within



three years. The licensee was unable to meet either this schedule or conform to the terms of the original license. In 1936, after an extension granted by the Commission had expired so that the licensee could take advantage of the rights originally accorded it in 1930 only by further Commission action, the authorization was amended, at the licensee's request, to call for only two generating units with a total capacity of 154,000 hp. Subsequently, a third unit was separately licensed in 1961, as of 1954. This 78,500 hp. unit had been built and in operation since 1954 without the required authorization.

The original license, as issued in 1930, specified annual charges as compensation for use of the tribal lands and provided in Article 30(D) for readjustment by mutual agreement between the Commission and the licensee, with approval of the Secretary of the Interior or, in the absence of such agreement, by arbitration in the manner provided for in the United States Arbitration Act. At the time the license was issued, Section 10(e) of the Federal Power Act stated that readjustment for use of tribal lands should be in the manner prescribed in the license. Section 10(e) of the Act was amended in 1935, prior to the "amendment" which established the actual terms under which the first two units of the project were constructed and operated, to provide that the readjustment of such charges could be by the Commission at the end of twenty years after the project was available for service. Nevertheless, the majority's decision concludes that the arbitration provision of the 1930 license

remained binding after that amendment, primarily because it believed the arbitration provision had been specifically bargained for in 1930 and that, accordingly, the readjustment by arbitration rather than by the Commission was a right which Congress, in passing the Power Act in 1920, had precluded itself from changing.

A. Assuming the validity of this reasoning (which we regard as unsound), it clearly relates only to the charges for those project works (including the first two units) licensed in 1930. For the third unit was licensed long after 1935 at a time when the Power Act stated in Section 10 that all licensing "shall be on the following conditions" including that "charges [for use of tribal lands] may \* \* \* be readjusted by the Commission". Thus, when the third unit was licensed in 1961, as of 1954, when its operation had begun without the required authorization, the statutory provision for readjustment of charges by the Commission after the project has been available for service for 20 years<sup>1/</sup> was automatically incorporated. While we agree with the Court (slip op. p. 11; see also dissent, slip op. p. 25) that the Commission is not precluded from permitting the parties to attempt to agree on readjusted charges, with the aid of arbitration if the parties so desire, no such condition was included in the

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<sup>1/</sup> Section 10(e) of the Act specifically pegs the time for the readjustment of charges for use of tribal lands to the date when the project is first available for service, even though not all the project works may have been licensed at that time. See F.P.C. brief herein, pp. 37-38.

1961 license and certainly, as Judge Leventhal states (slip op. p. 24), there would be no basis for believing that the arbitration provision of the 1930 licensing authorization could preclude the Commission from exercising its readjustment authority with respect to the third unit.

Nevertheless, this Court directed the Commission to dismiss the readjustment proceeding in its entirety for lack of jurisdiction -- even though that proceeding involved the readjustment for third unit charges as well as those for the first two units. It appears to us that the breadth of the judgment, when viewed in light of the explanatory opinion which in no way questions the Commission's view (note 1, supra) that the annual charge for all project works became subject to readjustment in 1959,<sup>2/</sup> assumes that the terms of the original license necessarily relate to all project works whenever licensed; in other words, that the mandatory licensing conditions of Section 10(e), in effect when the new project works were authorized in 1961, were inapplicable. But in the Third Unit Case, supra, this Court held that the 1961 authorization "although called an amendment, was a new and original license for the third unit." This was so even though the project was a unitary whole, for, as the Court said (ibid.):

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<sup>2/</sup> Even if the Court were to disagree with the Commission as to the time of readjustment, the difficulties resulting from readjustments by two forums would remain.

The Commission does not necessarily license all the project works of a given project at one time. It may, as it did here, grant authority for the installation, operation and maintenance of certain project works upon prescribed conditions as to construction and payments; but such a license does not cover additional works, as the petitioner seems to have recognized by applying for the licensing of the third unit. The provisions of the license concerning the initial installations as to payments and other conditions cannot logically be said, it seems to us, to project into and become parts of a new license for different and additional project works. [Emphasis added.]

This finding that the licensing of the third unit was an exercise of the Commission's initial licensing power necessarily meant that the third unit authorization was pursuant to the Act as amended in 1935. This is also manifest from the Court's statement that the charges "must be approved by the Secretary of the Interior and the Indians themselves" (298 F. 2d at 340), since the Indians were first given a voice in this determination by the 1935 amendment to Section 10(e), 49 Stat. 843. The 1935 amendments also required, of course, that final approval of the readjustment of annual charges be done "by the Commission \* \* \* upon notice and opportunity for hearing" rather than "in a manner to be described in each license", as the Act had required before 1935.

Even as to the first two units, the decision appears inconsistent with the Third Unit Case. For, it seems clear that Montana Power's actual authorization to construct those, or any units, stems from the 1936 amendment, not the 1930 license which by that time ceased to give Montana Power any affirmative rights in view of its non-compliance. In those circumstances, the so-called 1936 amendment, like the 1961 amendment, involved, in practical terms, the Commission's initial licensing authority.

B. The Court's direction to the Commission to dismiss the entire proceeding is not only in conflict with the Third Unit Case but raises serious questions as to the readjustment of charges attributable to the third unit operation on tribal lands. For while the arbitration clause does not apply to the third unit, the Commission, under the mandate, also does not appear to be free to make the readjustment. This would mean that the charges for the third unit could not be readjusted at all, either by the Commission or by arbitration, a result plainly inconsistent with the statute and presumably one not contemplated by the Court. In these circumstances, rehearing is warranted even if only to resolve the status of readjustment of third unit charges.

C. Basically, however, we believe that the inapplicability of the arbitration provision to the third unit affords a compelling reason, as Judge Leventhal points out (slip op. p. 24), why the readjustment of the charges for all three units, which can most realistically be determined on a unitary basis, should be made by the Federal Power Commission. It is patently incongruous to have the readjustment process split between two forums.

The majority's opinion that the arbitration provisions of the license withstood the 1935 amendment to the Power Act rests in large part on the view that the Commission, by issuing the license in 1930, became one of the parties to a "contract" and that its unilateral decision on the readjustment of the charges for the use of tribal lands might not be fair or impartial. This characterization of the Commission as merely a party to a contract misconceives

the Commission's role with respect to the annual charges. The real parties in interest are the tribes and the power company, even though the project charges may normally be passed on to the utility's customers in the form of rates. Indeed, Congress in 1935 by expressly authorizing the Commission, subject to court review as in all its actions, periodically to readjust the charges for use of tribal lands made plain its belief that the independent Commission established in 1930 would indeed be a fair and impartial tribunal as well as the one which by the nature of its experience, would be best able to adjudicate these controversies.

The reasons for the inclusion of the arbitration clause in the license in 1930 have long since disappeared. In 1930, when the license was issued, the Commission rather than being the independent regulatory agency it is today was composed of three Cabinet officers, the Secretaries of War, Agriculture, and Interior. The latter, of course, had separate responsibilities as trustee for the Indians. In those circumstances, the readjustment of charges by the Commission would necessarily have meant that the Secretary of the Interior would have had a conflict of responsibilities. The resort to arbitration, notwithstanding the difficulties that must necessarily arise when a multi-person tribunal which can only act by majority action attempts to negotiate with a private person, was thus an appropriate means of assuring an impartial readjustment tribunal. But the reason for having the Commission itself participate in arbitration had

ceased to exist by 1935 when Section 10(e) was amended by Congress. <sup>3/</sup>

For these reasons, we urge grant of this petition for rehearing, either by the panel or en banc, a withdrawal of the recent decision and affirmance of the Commission's jurisdiction, as well as of its exercise thereof.

Respectfully submitted,

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For respondent.

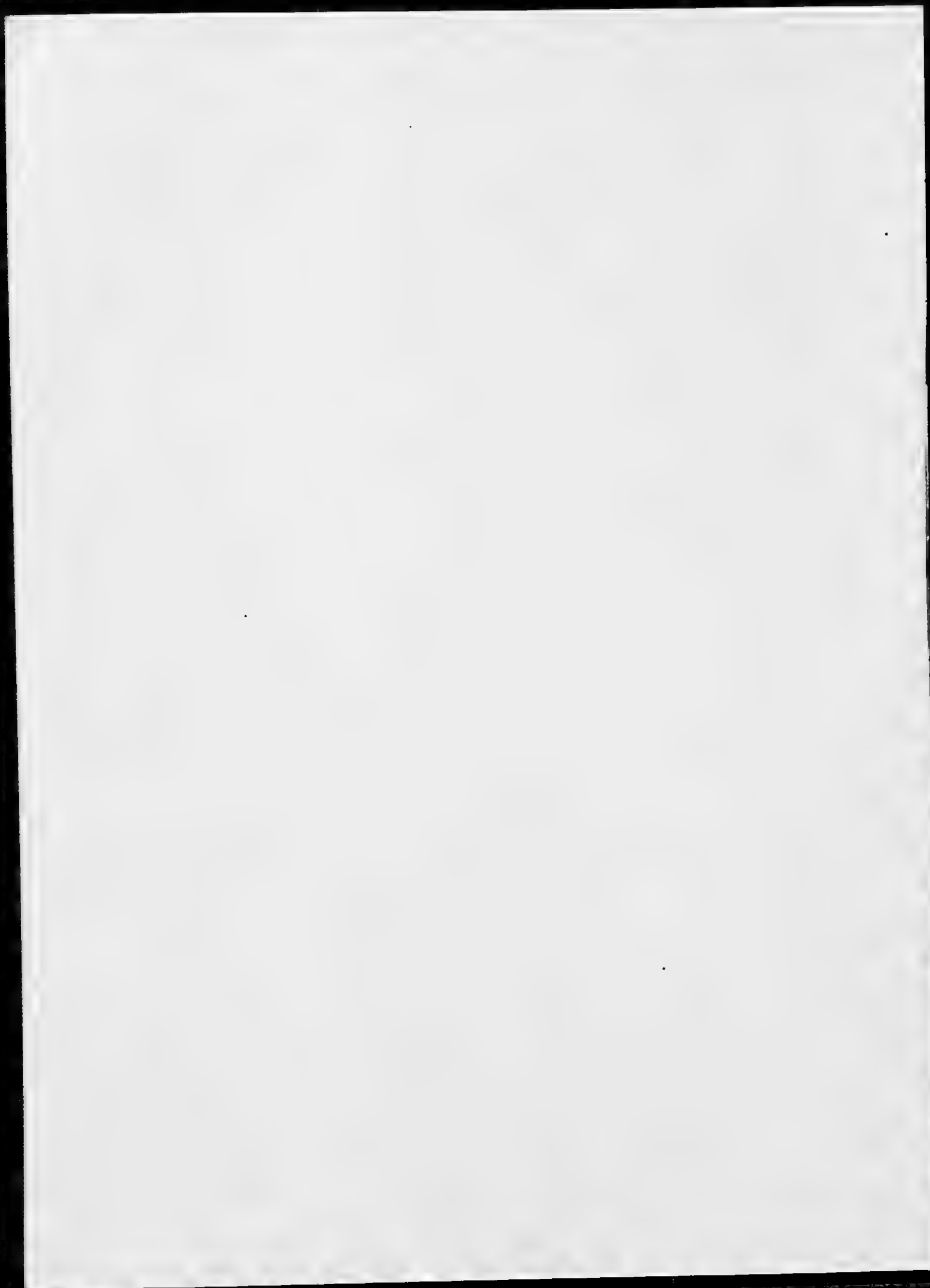
Federal Power Commission,  
Washington, D. C. 20426.

July 7, 1969

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<sup>3/</sup> The Court is incorrect in suggesting that the Commission has bound itself to arbitration with respect to Indian land payment readjustments since the 1935 amendments to the Power Act. The agreement to which it refers (slip op. p. 11) between the Portland General Electric Company and the Warm Springs Indians contained a provision that charges there agreed to by the Indians and the company would be subject to readjustment 10 years after the project was in operation and every five years thereafter, with a provision for arbitration if the two parties did not agree. The agreement, which while referred to in the license was not incorporated as such, in no way even purported to involve the Commission in the negotiation and arbitration process. While the Commission was free to accept the results thereof, nothing in the order approving this agreement purported to bind the Commission to the figures agreed upon by the parties, either through negotiation or arbitration. Indeed, this type of agreement like any other settlement would remain subject to Commission scrutiny to determine its compatibility with the broad public interest that the Commission is charged with protecting. For example, unnecessarily high charges concurred in by the parties might be disallowed by the Commission if they were insupportable and likely to have adverse rate consequences.





CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing petition for rehearing by mailing copies to counsel at the following addresses:

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Federal Power Commission  
Washington, D. C. 20426  
July 7, 1969

PETITION OF THE SECRETARY OF THE INTERIOR,  
INTERVENOR, FOR REHEARING AND SUGGESTION  
THAT SUCH HEARING BE HAD EN BANC

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UNITED STATES COURT OF APPEALS

United States Court of Appeals  
for the District of Columbia Circuit

FOR THE DISTRICT OF COLUMBIA CIRCUIT **FILED** JUL 7 1969

No. 21904

*Nathan J. Paulson*  
CLERK

THE MONTANA POWER COMPANY, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent

THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA,

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Intervenors

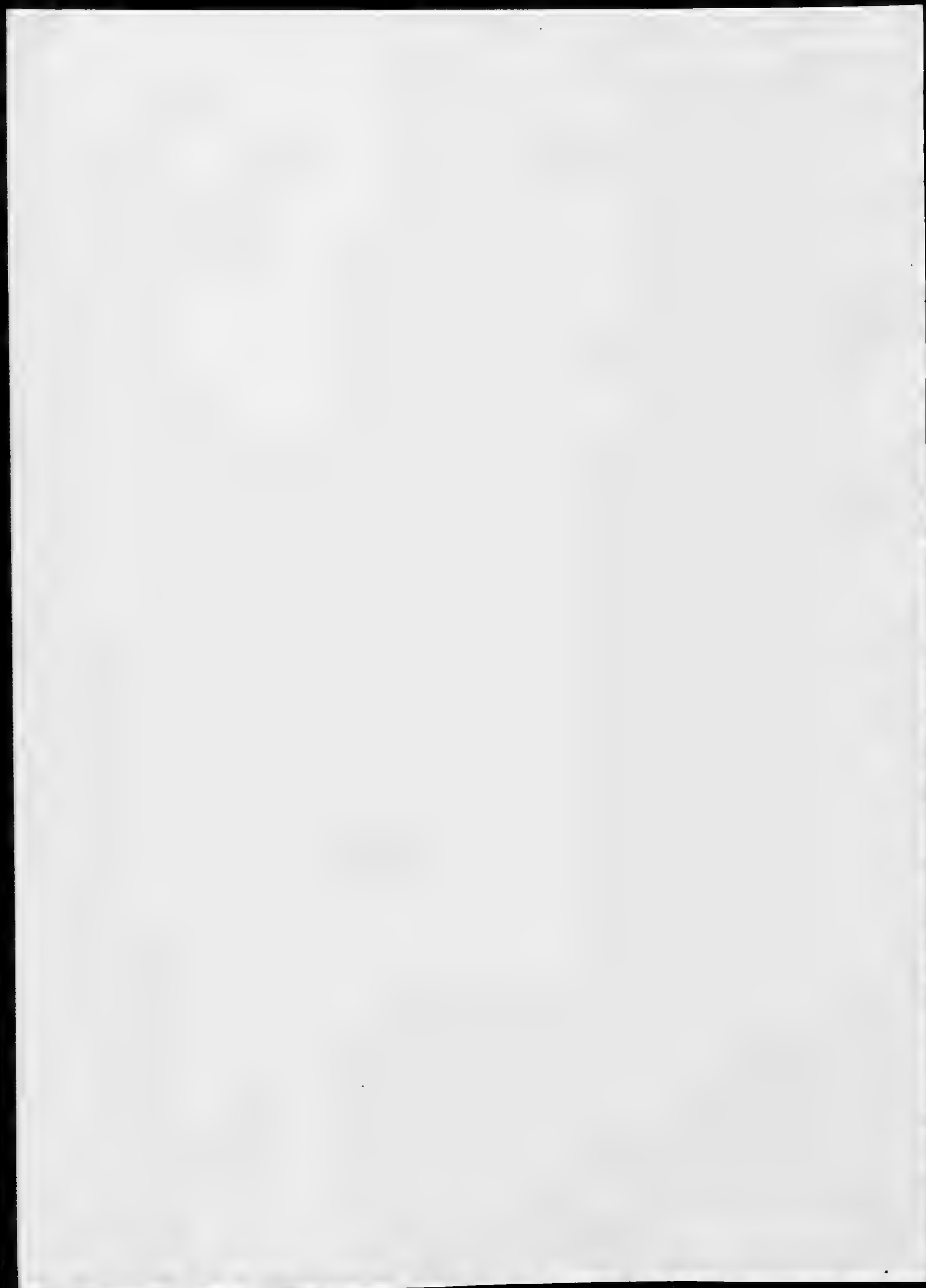
ON PETITION TO REVIEW ORDERS OF THE  
FEDERAL POWER COMMISSION

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21904

THE MONTANA POWER COMPANY, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent

THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA,

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

Intervenors

---

ON PETITION TO REVIEW ORDERS OF THE  
FEDERAL POWER COMMISSION

---

PETITION OF THE SECRETARY OF THE INTERIOR,  
INTERVENOR, FOR REHEARING AND SUGGESTION  
THAT SUCH HEARING BE HAD EN BANC

Comes now the Secretary of the Interior, intervenor in the above-entitled cause, by the undersigned attorneys of the Department of Justice, and presents this petition for rehearing and suggests that such hearing be had en banc, and in support thereof respectfully shows:

1. The majority opinion is in error in holding the arbitration provisions of the license were not changed by the 1935 amendments to the Federal Power Act and subsequent amendments to the license negotiated between the Indians and Montana Power Company. - After 10 years of litigation, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana,

on whose behalf the Secretary of the Interior intervened in this case, find themselves facing further years of litigation and delay in getting the increased rentals for use of tribal lands to which the Federal Power Commission has determined they are entitled.<sup>1/</sup> This further delay and financial hardship is occasioned by the technical error in the view of a majority of a panel of this Court that the Indians have chosen the wrong forum in which to litigate their rights to the increased rental. It is submitted the majority opinion is in error in holding the licensee, Montana Power Company, has an absolute right to have readjustment of the annual charges done by arbitration only. In view of the large sums now owing to the Indians, the long delay they have already suffered in receiving their increased rental, the expenses of litigation and the financial hardship they face by further delays, it is respectfully suggested that ~~that~~ the matter is of sufficient importance to warrant a rehearing en banc.

At the outset, it must be stated that we do not interpret the majority opinion to hold that there is any due process question involved. The majority does not find the Federal Power Commission less than an impartial body. Nor does it indicate

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<sup>1/</sup> Under the holding of the Federal Power Commission, the Tribes are already entitled to in excess of \$7,000,000 plus interest, and the deficiency is increasing at the rate of over \$700,000 per year.

there is anything unfair about the adversary procedures which the parties have been pursuing these many years. Certainly no one can claim they have not been fully heard. Rather, the majority seems to rely mainly on the basis of a contractual right "\* \* \* the right to arbitration, in this case, was a substantive right, embodied in the contract, bargained for and bought by the Commission in its effort to secure a licensee for this project. As such the Commission will be bound by the terms heretofore agreed upon." (Slip opinion, p. 10.) Without repeating the arguments set out in our brief as to why Section 10(e) of the Federal Power Act, 41 Stat. 1069, as amended, 16 U.S.C. sec. 803(e), granted jurisdiction over the readjustment proceeding to the Federal Power Commission, we emphasize the most obvious flaw in the reasoning of the majority opinion.

The record in this case shows that, whatever may have been the intent of the parties to the issuance of the 1930 license, the licensee was clearly in default after the passage of the 1935 amendments to the Federal Power Act, and the matter had been referred to the Attorney General for revocation of the license. Revocation was only avoided by an amendment to the license in July 1936. A careful reading of the record shows that the parties accepted the Federal Power Act as it existed in 1936. This is proved by the acceptance of Amendment No. 2 to the license by Montana Power in these terms (R. 9055):



IN TESTIMONY OF ACCEPTANCE of all the terms and conditions of the foregoing instrument and of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended, the Licensee, this 30th day of June, 1936, has caused these presents to be signed \* \* \*. 2/

The acceptance in terms of the Federal Water Power Act as amended logically follows from other provisions of Amendment No. 2. By the 1935 amendment to Section 10(e) of the Federal Power Act, the authority of the Federal Power Commission to set the annual charge was for the first time made "in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands \* \* \*." 49 Stat. 843. The recitals in Amendment No. 2 set out that Montana Power and the Tribes "have executed an agreement and supplementary agreement in writing whereby the aforesaid tribe \* \* \* has consented to the amendment of the license hereinafter set forth, including the annual charges therein provided for \* \* \*" (R. 9044). The recital of the Secretary of the Interior's approval of Amendment No. 2 specifically states that he was advised "of consent of said tribe to the amendment of the license hereinafter set forth including the annual charges therein provided for \* \* \*" (R. 9045). The recital of the F.P.C.'s findings on Amendment No. 2 "upon due consideration" of the agreements with the Tribes found (R. 9046):

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2/ Emphasis supplied throughout.

(c) That payments in accordance with the schedule proposed in Exhibit A of aforesaid agreement would constitute a reasonable annual charge for the use of the tribal lands involved, if approved by the Indian tribe having jurisdiction over such lands \* \* \*.

The F.P.C.'s findings are, of course, a paraphrase of the statutory language of Section 10(e) after the 1935 amendment. The above recitals and acceptance can only indicate that the parties were dealing with Section 10(e) of the Federal Power Act after the 1935 amendment requiring tribal approval of rentals affecting tribal lands. This is the same Section 10(e) that gives the Federal Power Commission jurisdiction to fix such charges and the readjustments. Therefore, the opinion in this case can be correct only if this Court wants to hold the parties intended to pick and choose among the clauses of amended Section 10(e) accepting some and rejecting others in spite of the statement in the acceptance that the parties are accepting "all the terms and conditions of the \* \* \* Federal Water Power Act \* \* \* as amended \* \* \*" (R. 9055).

The simple answer to the reliance of the majority opinion on another section of Amendment No. 2 that the amendment does not amend the license other than as specified therein is that the acceptance of the Federal Power Act as amended was specified therein (Slip opinion, p. 14).

It is submitted there is clearly no basis for holding that Montana Power Company has a contractual right to arbitration under Section 30(E) of the license. To the contrary, it could more logically be held that the Indians have a contractual right, as just shown, to have the annual charges readjusted by the Federal Power Commission in accordance with Section 10(e) of the Federal Power Act.

2. Compliance with the direction of the majority opinion to refer this case to arbitration under Section 30(D) of the license is impossible because of the intervening changes in the legal status, rights and duties of the Indians, the Secretary of the Interior and the Federal Power Commission. - The majority opinion has held that Section 30(D) of the license creates a vested contractual right. Section 30(D) provides in pertinent part (R. 8879):

\* \* \* In case the Licensee, the Commission, and the Secretary of the Interior can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in "The United States Arbitration Act," (U.S.C., Title 9), \* \* \*.

When the license was issued in 1930, the Secretary of the Interior was both a member of the Federal Power Commission and had statutory responsibility to act in protection of the Indians.

The Tribes did not enter the negotiations for the license because at that time they were not a separate entity. The Secretary has not been a member of the Federal Power Commission since shortly after the license was issued in 1930. The Tribes have been organized as a separate legal entity under the Act of June 18, 1934, 48 Stat. 984. The right of the Tribes to represent their own interests before the Federal Power Commission in readjustment proceedings has been given congressional recognition by Section 10(e) of the Federal Power Act. 16 U.S.C. sec. 803(e). The composition of the Federal Power Commission has been changed from three cabinet officers to five independent commissioners.

By the express terms of Section 30(D) of the license, the parties to the arbitration proceeding would be Montana Power Company, the Federal Power Commission and the Secretary of the Interior. There is no provision for representation of the Tribes. Yet the Secretary no longer has a clear legislative mandate to represent the Tribes in readjustment proceedings, in view of the facts set out above. The composition of the Federal Power Commission has changed. Even Montana Power Company is a successor to the original licensee. It is therefore inescapable that intervening changes of law and circumstances have drastically changed the nature of any arbitration proceeding which could be held some 40 years after issuance of the

original license. The Secretary of the Interior is uncertain exactly what function he would or should play in such an arbitration proceeding.

Therefore, even if the majority opinion is to stand, there must be further clarification of the roles to be played by the various parties as they exist in 1969. It is not clear what function the Federal Power Commission would undertake, if any, in an arbitration proceeding. Assuming that the Secretary must now represent the interest of the Tribes in spite of the fact that they have been represented very capably by counsel of their own choosing over the last 10 years, the legal problems with arbitration heretofore raised in this proceeding require immediate settlement. The threshold questions are these:

(1) Which United States court has jurisdiction over disputes about arbitration in view of the provision of 9 U.S.C. sec. 4 that it is the "court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties," where that "court" would appear to be solely the Federal Power Commission?

(2) Can the Indians now recover payments retroactively to 1959, the time they commenced action before the Federal Power Commission, when they institute the new proceedings for arbitration?

(3) Had the Federal Power Commission or the Secretary of the Interior authority in 1930 to commit themselves or the Indians to an arbitration proceeding?

(4) Is the United States Arbitration Act applicable to an F.P.C. license in view of its limitation in 9 U.S.C. sec. 2 to "any maritime transaction or a contract evidencing a transaction involving commerce?"

#### CONCLUSION

For the foregoing reasons, the Secretary of the Interior, Intervenor, submits that a rehearing should be granted and suggests that such rehearing be en banc.

Respectfully submitted,

SHIRO KASHIWA,  
Assistant Attorney General.

ROGER P. MARQUIS,  
A. DONALD MILEUR,  
Attorneys, Department of Justice,  
Washington, D. C. 20530.

JULY 1969

#### CERTIFICATE

I certify that this Petition for Rehearing and Suggestion that Such Hearing be had En Banc is made in good faith and not for the purposes of delay.

*A. Donald Mileur*  
A. DONALD MILEUR





Before the  
United States Court of Appeals  
for the District of Columbia Circuit

United States Court of Appeals  
for the District of Columbia Circuit

No. 21,904

FILED JUL 7 1969

The Montana Power Company,  
Petitioner

*Nathan J. Paulson*  
CLERK

v.

Federal Power Commission,  
Respondent

The Confederated Salish and Kootenai Tribes  
of the Flathead Reservation, Montana,  
Secretary of Interior,  
Intervenors

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No. 21,767

The Confederated Salish and Kootenai Tribes  
of the Flathead Reservation, Montana,  
Petitioners

v.

Federal Power Commission,  
Respondent

The Montana Power Company,  
Intervenor

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PETITION OF THE CONFEDERATED TRIBES FOR  
REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Come now the Confederated Salish and Kootenai Tribes,  
Intervenors in No. 21,904 and Petitioners in No. 21, 767, and

respectfully petition for rehearing under Rule 40, Federal Rules of Appellate Procedure, and suggest a rehearing en banc under Rule 35, Federal Rules of Appellate Procedure, of the order of June 23, 1969, and opinion of June 26, 1969.

## I

### Introduction

The decision of the majority of the Court (Judges Burger and Tamm, Judge Leventhal dissenting), which we believe is incorrect on the merits, has the additional and probably unintended effect of cutting the Tribes<sup>1/</sup> off from their statutory right, not to mention their common right under ordinary principles of due process, to participate in any further proceedings to adjust the rent for the Tribes' hydro-electric power site. Even if the decision is allowed to stand on its own rationale, it is absolutely necessary that some means be devised by the Court to preserve the Tribes' right to participate in the rent readjustments. As it now stands, neither the Tribes nor any party suitable to represent the Tribes' interests has a right to participate in the further proceedings.

The majority held the Company is entitled to have the annual rental adjusted by a private arbitrator despite these facts: (1) in 1935, Congress expressly designated the

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<sup>1/</sup> The Confederated Tribes include over 5300 American Indians.

Federal Power Commission as the agency to determine the readjusted rental, after notice and opportunity for hearing; and (2) if the Company had any arbitration rights under the original 1930 license, it lost those rights when it defaulted under the license, and only revived the license by negotiation with the Tribes under the authority of the 1935 act of Congress which precluded arbitration and conferred jurisdiction on the Federal Power Commission.

The Court's reversal of the Federal Power Commission comes ten years after the Tribes filed a timely petition seeking readjustment of the annual rentals and almost four years after a full-scale trial which resulted in the Hearing Examiner ordering the Company to increase the annual payments from \$238,375 to \$850,000, which on appeal the Commission raised to \$950,000. These figures give an idea of the wind-fall enjoyed by the Company under the rental schedule established in the 1930's.

## II

### Statement of the Facts and Case

In the 1920's Montana Power Company wanted to develop one of the Tribes' most valuable hydroelectric sites. The Company entered into negotiations with the Secretary of the Interior and in May, 1930, the Federal Power Commission issued to a wholly owned subsidiary of the Company a license to develop the site. The license was for a 50-year term and the Company

guaranteed its performance. The annual rentals were intentionally low because of uncertainties, including the sale of power, but the license contained a provision for readjustment 20 years after the start of commercial operation, as provided for in Section 10(e) of the then Federal Water Power Act.<sup>2/</sup>

When the license was issued the Commission was composed of the Secretaries of War, Agriculture and Interior. The Secretary of the Interior represented the Tribes, who were not formally organized as they were later to be. The license provided that any dispute over readjusting the rental would be settled by arbitration and not the Commission.<sup>3/</sup> This removed the Secretary of the Interior, who as the Tribes' representative would have a conflict of interests, from participating in the settling of any dispute. The Federal Power

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<sup>2/</sup> ". . . when licenses are issued involving . . . tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license. . . ." (41 Stat. 1063, 1069; emphasis added.)

<sup>3/</sup> Article 30(d) of the license reads: "The annual charges payable [to the Indians] under this license may be readjusted at the end of twenty (20) years after the beginning of operations under this license and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission and the Secretary of the Interior cannot agree upon the readjustment of such charges, it is hereby agreed that the fixing of the readjusted charges shall be submitted to arbitration in the manner provided for in 'the United States Arbitration Act,' . . . ."

Commission was reorganized shortly after the license was issued, and the Secretary of the Interior was removed as a member, but the license was not amended.

In 1934, Congress enacted the Wheeler-Howard Act.<sup>4/</sup> It granted Indian Tribes new status and powers of self-government. In 1935, Congress implemented that action by amending Section 10(e) of the Federal Power Act to provide that henceforth no license involving tribal lands could be issued by the Commission unless approved by the tribe involved (if the tribe was organized under the Wheeler-Howard Act). Thereafter, any readjustment of annual rentals would be by the newly organized Commission, after notice and opportunity for hearing, and subject to approval of the tribe.<sup>5/</sup>

Meanwhile, the Company failed to construct the dam as required by the license. The default occurred in 1935, and the Commission referred the matter to the Attorney General for revocation pursuant to Section 13 of the Federal Power Act.

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<sup>4/</sup> 48 Stat. 984.

<sup>5/</sup> ". . . . Provided, That when licenses are issued involving . . . tribal lands embraced within Indian reservations the Commission shall. . . in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), [Wheeler-Howard Act], fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice an opportunity for a hearing." (Act of August 26, 1935, 49 Stat. 838, 843; emphasis added.)

In October, 1935, the Tribes organized under the Wheeler-Howard Act. Since the 1935 amendment to Section 10(e) recognized them as the direct party in interest, the Company approached the Tribes in an effort to rescue its defaulted right to exploit the tribal site. The Tribes were receptive and an agreement was reached on revised construction and payment schedules. The Tribes waived any rights to damages caused by the Company's 1935 default. Nothing was included about the arbitration clause. There was a catch-all phrase that the unamended portions of the license remained in effect; but there also was a clause binding the Company to the terms of the Act, as amended. The Secretary of the Interior and the Commission approved the agreement. It became Amendment No. 2 to the license. The Kerr plant was built and started commercial operations on May 20, 1939.

On May 19, 1959, twenty years later, the Tribes petitioned the Commission for a hearing to readjust the charges under Section 10(e), as amended. Eventually a hearing was held in which the Company, the Tribes, the Secretary of the Interior and the Staff of the Federal Power Commission participated. As noted, the hearing resulted in the Commission raising the annual charge from \$238,375 to \$950,000. The Tribes and the Company appealed to this Court. The appeals were consolidated and on June 26, 1969, the majority of the Court held, in respect to Article 30(d)<sup>6/</sup> of the license:

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<sup>6/</sup> Quoted at p. 4, supra, Note 3.

". . . that the right to arbitration, in this case, was a substantive right, embodied in the contract, bargained for and bought by the Commission in its effort to secure a license for this project. As such the Commission will be bound by the terms heretofore agreed upon." (Slip Opinion of June 26, 1969, p. 10.)

### III

The Effect of the Court's Order is to Deny to the Confederated Tribes the Right to Participate in Any Proceeding to Determine the Readjusted Annual Charge to be Paid by the Company

The majority held Article 30(d) of the license controls the question of readjustment of the annual charge. That holding freezes out the Tribes, the property owners, from participating at any stage, for any readjustment is to involve only the Commission and the Company. In addition to being precluded from participating, the Tribes are denied even a voice, for the Federal Power Commission does not represent the Tribes and never has. It cannot represent the Tribes today; as a Federal agency, it is charged with an obligation to consider not only the interests of the general public, but those of the Company, a public utility.

The fact that the Secretary of the Interior has power to approve or disapprove any agreement does not afford the Tribes, or for that matter the Secretary himself, the right to participate in the proceedings. In any case, the Tribes do not have to rely on the Secretary of the Interior to guard their interests. Congress, by the Wheeler-Howard Act,



recognized the Tribes' right to employ legal counsel and to be heard in all matters affecting their property. The order of the Court denies to them that right.

The majority of the Court in effect held that the license, as drafted in 1930, five years prior to the Company's default, confers on the Company a right to the arbitration procedures set forth in Article 30(d) of the license, transcending Congressional intent. In so holding, the majority ignored the Company's default in 1935, and thereupon denied to the Tribes their constitutional right to due process, i.e., the right to participate in a proceeding vitally affecting their property, a right that must be preserved.

#### IV

##### The Petition for Rehearing

We respectfully petition the remaining members of the original panel to rehear the case. Because Judge Burger is now Chief Justice of the United States, he may not participate in this petition for rehearing.

We suggest, under this unique circumstance, that the remaining members of the panel be polled, and if Judge Tamm would deny rehearing and Judge Leventhal would grant rehearing, we further suggest that a third panel member be appointed to review the briefs and this petition, and to cast the deciding vote as to whether the case should be reheard on oral argument.

## V

The Suggestion for Rehearing En Banc

The majority opinion takes from the Tribes, the sole property owners, their right to participate in any proceedings to readjust the annual rental paid by the Company. This denial not only violates the Tribes' constitutional rights, it also renders nugatory the effect of a completed and fair administrative hearing; and it denies to the Tribes the substantial increase in rentals of which the Tribes have been deprived for over ten years.

Considering these facts it is clear that questions of exceptional importance are involved and it is suggested that this is an appropriate case for rehearing en banc.

Respectfully submitted,

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154  
**BRIEF FOR MONTANA POWER COMPANY,  
PETITIONER-INTERVENOR**

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 21904**

THE MONTANA POWER COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD  
RESERVATION, MONTANA, *Intervenors.*

**No. 21767**

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD  
RESERVATION, MONTANA, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

THE MONTANA POWER COMPANY, *Intervenor.*

**Petitions to Review Orders of the Federal Power Commission**

United States Court of Appeals  
for the District of Columbia Circuit

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### QUESTIONS PRESENTED

In a proceeding to readjust the amount of a fixed annual payment by a power company for the use of Indian lands in a power project—

1. Did the Federal Power Commission, under the terms of the license to the company, have jurisdiction to readjust the annual payment?

2. If the Commission had jurisdiction, was the increase in the annual payment which it ordered arbitrary, unreasonable, and without support in the Record, because of the premises with which it started, the methods which it used in arriving at its result, the factors which it considered and failed to consider, the inconsistency of its decision with a prior decision of the Court, and the extraordinary result which it reached?

3. If the Commission had jurisdiction to readjust the annual payment, was it contrary to the terms of the license, as well as arbitrary and unreasonable, to make the readjusted annual payment retroactive to 1959?

4. If a retroactive payment was justified, was it arbitrary and unreasonable to award interest on the amount payable, or in any event interest at more than 4 per cent?

• • •

This case has not previously been before this Court.

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21904

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Petitions to Review Orders of the Federal Power Commission

---

## BRIEF FOR MONTANA POWER COMPANY, PETITIONER-INTERVENOR

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### JURISDICTIONAL STATEMENT

On October 4, 1967, the Federal Power Commission issued its "Opinion and Order Readjusting Annual Charges" in *The Montana Power Company—Project No. 5*, and on March 21, 1968, denied applications for rehearing, which had been duly filed with the Commission and which included the several objections to the Commission's order that are now before this Court. On March 22, 1968, the

Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, filed a petition to review with respect to one portion of the order, which is No. 21767 in this Court. Petition for leave to intervene in that case was granted to Montana Power Company on April 23, 1968. On May 6, 1968, the Company filed its petition to review, which is No. 21904 in this Court. The Tribes were granted leave to intervene in that case on June 13, 1968. The jurisdiction of this Court in both cases is founded upon Section 313(b) of the Federal Power Act (49 Stat. 860, as amended; 16 U.S.C. § 825(l)(b); App. A, p. 8a).

### STATEMENT OF THE CASES

These cases involve the readjustment of the annual rentals due to the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (hereafter, the Tribes) by the Montana Power Company (hereafter, the Company), by reason of the fact that the Reservation includes certain of the lands involved in Project No. 5. The original license for works at Project No. 5, under which a dam (known and hereinafter sometimes referred to as the Kerr Dam), and reservoir, conduits, powerhouse and transmission lines were built, was issued on May 23, 1930, for a term of 50 years, pursuant to the Federal Water Power Act (41 Stat. 1063, 16 U.S.C. §§ 791-823) and the Act of March 7, 1928 (45 Stat. 200, 212-213) which authorized the Commission to issue a license involving the use of lands within the Flathead Reservation "upon terms satisfactory to the Secretary of the Interior."

The terms of that 1930 license relevant in these cases are contained in Article 30(D), which provides:

"The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operation under this license and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In



case the Licensee, the Commission, and the Secretary of the Interior cannot agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in 'The United States Arbitration Act,' (U.S.C., Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development." (App. B, p. 12a)

This Article was responsive to Section 10(e) of the Federal Water Power Act, which then read, in relevant part, as follows:

"... when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license." (App. A., p. 2a)

On May 19, 1959—at the expiration of 20 years from the beginning of operations—the Tribes filed with the Commission a petition for readjustment of the annual charges. Relying on the provisions of Article 30(D) of its license, the Company has at all appropriate times objected to the jurisdiction of the Commission to decide a question which, under the terms of the license, was to be submitted to arbitration. Initially, the Company brought an action in the United States District Court in Montana to compel arbitration. *Montana Power Co. v. Federal Power Commission* (No. 1251, May 24, 1965; App. C, p. 17a). That court, while indicating that it believed the position of the Company was correct (App. C, p. 19a), held that the issue as to the Commission's jurisdiction was for the Commission

in the first instance, and ultimately for a Court of Appeals on review under Section 313(b). Thereafter the Company raised the issue before the Commission. In its decision on October 4, 1967, the Commission held that it had jurisdiction. The Company's challenge to that decision is the threshold issue in this case, discussed in Point I, below.

Although the Tribes' petition for readjustment was filed with the Commission in 1959, further proceedings were delayed by the Commission for several years. Hearings were finally held in 1965, an examiner's report was issued and excepted to, and the final decision and order of the Commission were issued in 1967.

The opinion of the Commission, after concluding that the Commission had jurisdiction, stated that the annual rentals should be increased, and by a very substantial amount. The previous annual rental was \$238,375—\$175,000 per year for two power generating units and since 1954 an additional \$63,375 for a third unit. This was increased by the Commission to \$950,000. Included in this latter figure was an increase in the annual rental for the third unit, which had been separately licensed by the Commission, and for which the rental had finally been determined by this Court in 1962. *Montana Power Co. v. Federal Power Commission*, 112 App. D.C. 7, 298 F.2d 335. The Commission, over the objection of the Company, concluded that it had authority to increase the rental for this third unit notwithstanding the fact that a period of twenty years had not run under its license. In addition, the basis upon which the Commission reached its conclusion as to the amount of the readjusted annual rental was and is challenged by the Company on a number of grounds. These objections constitute the second major issue in the case, which is discussed in Point II, below.

Finally, the Commission concluded, again over the Company's objection, that the readjusted annual rental was payable, retroactively, from the end of the 20-year period

of operations—May 20, 1959, and that the amount due should bear simple interest at the rate of 6 percent per annum from such date. Those conclusions are likewise challenged, and are dealt with in Points III and IV, below.

The petition for review filed by the Tribes (No. 21767) raises only a single issue—whether the \$950,000 annual rental fixed by the Commission should be increased by \$42,000. The Company's opposition to the position of the Tribes on this issue will be set out in its reply brief.

Both the Company and the Tribes duly filed petitions for rehearing with the Commission, raising, *inter alia*, the objections made in the petitions for review filed in this Court. The Commission granted the petitions for rehearing on November 17, 1967, in order to afford itself further time to consider them, but on March 21, 1968, denied them *in toto*. One Commissioner, who had concurred specially in the Commission's October 4, 1967 order, dissented.

#### STATEMENT OF POINTS

1. The Commission erred in assuming jurisdiction to readjust the amount of the annual payment when the license provided that the readjusted amount would be determined by way of arbitration, and the Act in effect when the license was issued guaranteed that no later legislation would affect licenses already issued.

2. The Commission's determination that the annual payment should be "readjusted" from \$238,375 to \$950,000 was arbitrary and unreasonable, in that (1) it was based not on a "readjustment" but on a de novo determination; (2) it employed an arbitrary and illegal method of determining the annual "value" of the project; (3) it employed an arbitrary and unreasonable method of determining the share of the Tribes in that "value"; (4) it ignored a prior decision of this Court; and (5) it reached a wholly unreasonable result.

3. The Commission's order making the "readjusted" annual payment retroactive to 1959 is contrary to the terms of the license, and is in any event arbitrary and unreasonable.

4. The Commission's order requiring interest to be paid on the retroactive portion of the "readjusted" annual payment is unlawful, arbitrary and unreasonable, and in any event should not be at a rate in excess of 4%.

### SUMMARY OF ARGUMENT

#### I

The Commission lacked jurisdiction to make the determination of readjusted annual rentals for the Project, since Article 30(D) of the license expressly provides that the determination will be made, if the Company and the Commission, with the approval of the Secretary of the Interior, cannot agree on a figure, by way of arbitration. Article 30(D), which was a carefully negotiated and important provision of the license, was agreed to in 1930 when Section 10(e) of the Act made the manner of determining readjusted rates a matter of negotiation, the results of which would be "described in each license." The amendment of Section 10(e) in 1935, which gave the Commission authority to determine the readjusted rentals, was not intended by Congress to affect existing licenses. Moreover, Congress had expressly provided in Section 28 of the original act, under which the license was issued, that no subsequent amendment of the act "shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder." Section 28 has not been modified or repealed.

Hence, the basis for the Commission's assumption of jurisdiction, that Congress *could* have effected an amendment of the Company's license, is beside the point, because Congress made no attempt to do so. And in any event, the Commission is in error; the arbitration provision of the license is a substantive provision, bargained for as a major

element in the agreement, and hence a vested right beyond the power of Congress to take away.

Finally, the Commission's decision creates a serious constitutional issue, which can be avoided by enforcing the arbitration clause of the license. The issue arises because of the assertion by the Secretary of the Interior that he has power to veto any determination of readjusted annual rentals by the Commission or by this Court if he believes the amount to be inadequate. This assertion creates a situation in which, if the Commission makes the determination and that determination is reviewed by this Court, the decision will be final only with the acquiescence of the Secretary—a situation that ousts this Court of jurisdiction. *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948). If the license provisions are enforced, and the dispute is remitted to the arbitration to which the Secretary has already consented in approving the original license, this issue is avoided.

## II

In the event the Court reaches the issues on the merits, we believe that the decision of the Commission is arbitrary and unreasonable on several grounds.

A. The license, and the statute, speak of a "readjustment" of the annual charges after 20 years. "Readjust" does not mean "fix anew." Yet the Commission refused to consider the annual charges originally negotiated as a point of departure, asserting rather that "the entire analysis must be made *de novo*." This was fundamental error. *California Oregon Power Co. v. FPC*, 99 App. D.C. 263, 239 F.2d 426 (1956).

B. Moreover, the Commission was unreasonable and arbitrary in its selection and application of the methods used in its *de novo* determination of the annual charges, both with respect to its determination of the annual "value" of

the Project, and its determination of the share thereof belonging to the Tribes.

1. The "profitability" method of determining the annual value of the Project, as applied by the Commission, assigned "earnings" to the Project in an arbitrary fashion. The Commission attributed "earnings" to the various Company properties on the basis of investment as among the Company's power producing, transmission, and distribution properties. Such an allocation is proper in a regulated company whose earnings are related to and limited by its investment. Then, however, the Commission allocated earnings within the power producing properties on a different basis—on the power produced by each. This cannot be justified.

The unreasonableness of this inconsistent method of allocating "earnings" is accentuated by the Commission's treatment of the benefits to the Project from the upstream Government dam at Hungry Horse. "Earnings" allocated on the basis of power production gave full effect to the benefits received by the Project from Hungry Horse water supplies, but excluded the amounts that the Company was required to pay for these same benefits under Section 10(f) of the Act. Indeed, Section 10(f) was intended by Congress to deal comprehensively with these headwater benefits, and does not permit the Commission, in derogation of Congressional policy, to assign a portion of such benefits to the Tribes.

Finally, the "profitability" method is in any event legally improper, since it requires the Commission in effect to determine the Company's rate base, its reasonable rate of return, and its so-called "excess" profits. The Act assigns rate making authority to the State of Montana, which has exercised it; there is no legal basis for the Commission either to determine appropriate rates or, having made such a determination, to inject the Tribes into those who are, by statute, to be concerned with the Company's profits.

2. The determination of that portion of the annual "value" that should be allocated as the Tribes' share is also arbitrary and unreasonable. A prior decision of this Court approved a 25% share to the Tribes of the added value of a third generating unit at the Project. *Montana Power Co. v. FPC*, 112 App. D.C. 7, 298 F.2d 335 (1962). That figure was reached by dividing the annual "value" in half because of the 50% ownership by the Tribes of the Project's lands, and dividing that again in half in recognition of the Company's contribution by way of investment in and operation of the Project. That allocation, which should be equally applicable no matter what annual "value" is involved, was rejected by the Commission, and the Tribes were allocated 42.13%, a figure based on the assumed share properly allocable to the Tribes of the various waters that flow through the Project's turbines. The method is not only arbitrary, and useful only as a manner of assigning a larger share to the Tribes, but when, as here, it is combined with the "profitability" method of determining annual value, it gives the Tribes a wholly unreasonable benefit from Hungry Horse.

3. Moreover, the Commission assumed to make a *de novo* determination of the entire Project, including the annual rentals due as a result of the installation of the third unit in 1954. In the Third Unit case before this Court, *supra*, the additional annual rentals there ordered by the Commission were sustained because the license issued for the third unit was a new license. Under the Act the annual payments fixed for a new license continue for a period of 20 years, which of course has not expired.

4. Finally, two further circumstances show the Commission's decision to be arbitrary and unreasonable. First, the insistence of the Secretary of the Interior that he could and would nullify the Commission's decision by exercising his veto power unless the award was high enough to satisfy him robbed the proceeding of fairness and made a decision solely on the evidence of record impossible. *United States*



ex rel. *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Second, a comparison of the results which the Commission's methods of determination would have had if they had been applied to recent power licenses on other Indian lands reveals how unreasonable it is to apply those methods here.

### III

Whatever may be the proper readjusted annual charge, the Commission erred in making it payable retroactively to 1959. This decision is contrary to the license, which provides that the annual charge first negotiated shall be payable "until adjustment . . . shall have been effected." In addition, it is beyond the authority of the Commission to impose a different and greater annual charge for the third unit at least for the years after 1959 which were adjudicated in the Third Unit case. Moreover, even if the Commission had the discretion that it asserts, it is unreasonable to impose on the Company a large liability which it could not take any measures to anticipate. Retroactivity to the date of the Examiner's decision in 1966, when the Company was put on notice of the possibility of a greatly increased annual charge, is the maximum that can be justified.

### IV

Finally, whatever the retroactivity, the Commission was arbitrary and unreasonable in assessing interest, and particularly interest at 6%. Any obligation of the Company was an unliquidated one, on which by general principles of law no interest is due; the equitable exceptions to that principle have no application here. And since by statute the amounts paid by the Company for the Tribes are deposited in the United States Treasury for the Indians' account and bear interest there at 4%, the delay in payment to the Tribes cannot be more than that amount. Particularly when there is not, and cannot be, any claim that the Company has broken any contract, or acted improperly or illegally, interest is not assessed as a penalty, as it appears to have been assessed here.

**ARGUMENT****I****THE COMMISSION ERRED IN CONCLUDING THAT IT HAD  
JURISDICTION TO FIX A READJUSTED  
ANNUAL PAYMENT**

The threshold issue in this proceeding is whether the Commission is empowered to determine the readjusted annual charges payable under the Company's license. While the Commission concluded that it was so empowered, its decision is entitled to no presumptive weight. Limitations on judicial review of administrative action have no application to jurisdictional issues that can be settled only by a judicial interpretation of the statutes. *See, e.g., Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947); *cf. Jersey Central Co. v. Federal Power Commission*, 319 U.S. 61 (1943).

The Company believes, for two reasons, that the Commission was in error in concluding that it was empowered to determine the readjusted annual payment. First, the Commission erred in claiming a power denied it by the license and the statutes. Second, its decision raises constitutional issues, and issues going to the jurisdiction of this Court, which are substantial, as the dissenting Commissioner pointed out—issues that are avoided if the readjusted annual rate is determined by arbitration, as the Company contends. We deal with these problems in that order.

**A. The Statute and the License Deny to the Commission Jurisdiction to Determine the Readjusted Annual Rental.**

The essential provisions of the statutes and the license are not complex. The Federal Water Power Act of 1920 (Act of June 10, 1920, c. 285, 41 Stat. 1063), which, amended, became Title I of the Federal Power Act in 1935, authorized the Commission to issue licenses for water power project works which would be binding upon the Government and the licensee for a period of up to 50 years—

the term of the Company's license here in issue. Section 10 of the 1920 Act (App. A, p. 1a), prescribed certain conditions which a prospective licensee was required to accept. The one relevant to the present case was the agreement to pay annual charges, fixed in advance, for the use of Indian lands, and to accept a readjustment of those charges at the end of 20 years and at periods of not less than 10 years thereafter "in a manner to be described in each license." In 1928 Congress added a further requirement relevant here—that within the Flathead Reservation any water power license be "upon terms satisfactory to the Secretary of the Interior." Act of March 7, 1928, 45 Stat. 200, 212.

Accordingly, in 1929 the Company entered into negotiations with the Commission and the Secretary of the Interior for the project that ultimately became Project No. 5. The negotiations, which are described below, finally resulted in a license in 1930. That license provided, by Article 30(D) quoted, *supra*, pages 2-3, that readjustment of the annual charges that had been agreed upon for the first 20 years would be made by mutual agreement between the Commission and the licensee, with the approval of the Secretary of the Interior, and failing such agreement would be fixed by arbitration in the manner provided for in the United States Arbitration Act.

The 1920 Act contained a further significant provision. Section 28 reads:

"The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder." App. A, p. 3a.

Section 28 has never been amended or repealed. Section 10(e), however, was amended in 1935. (App. A, p. 5a). The portion of that section relating to the fixing and readjust-

ment of annual charges for the use of Indian lands now reads:

"... when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing ...."

The question as to the Commission's jurisdiction is to be determined within this framework. The Company, when the time came to readjust the annual charges, sought to enter into negotiations with the Commission and the Secretary of the Interior pursuant to Article 30(D) of the license agreement, with resort to arbitration if necessary. Its efforts were unsuccessful and, as already noted, the Commission concluded that the 1935 amendment to Section 10(e) permits it to make the readjustment unilaterally.

Fortunately, this contention can be evaluated not only in terms of the statutory and license language, but also in terms of comprehensive contemporary explanation of the license and legislative provisions. To these we now turn.

1. **Article 30(D) of the License, Fixing the Manner of Determining the Readjustment of Annual Charges, Was Carefully Considered as a Major Issue in the Negotiation of the License Agreement.**

The language of Article 30(D) of the license, which directs arbitration of readjusted annual charges in the event they could not be mutually agreed to by the Commission, the Secretary of the Interior and the licensee, was finally

evolved after a series of alternatives had been proposed and rejected. The article lay close to the heart of the license, and can in no sense be dismissed as casual or unimportant.

The record of the negotiations was preserved because the license represented a significant breakthrough in several ways. The Flathead development was the first involving Indian lands in which power, rather than irrigation or reclamation, was the controlling factor. The Flathead license was the first in which the payment of annual charges was of major importance in the Company's business decision on whether or not to undertake the project, as well as to the Tribes. And, because of the 1928 Act dealing with the Flathead Reservation, the license negotiations were the first in which the Secretary of the Interior participated in an independent role, apart from his position as one of the members of the Federal Power Commission, as it was then constituted.\*

As a consequence, both the Secretary and the Commission made unusual efforts to preserve and clarify the principles that emerged from negotiations. An official record of the development of the negotiations, known as the "Scattergood Report," was prepared by the Secretary and published as a Senate Document (No. 153, 71st Cong., 2d Sess.) (R. 8227 *et seq.*) on the date of their successful conclusion, May 23, 1930. As that Report states (p. 6, R. 8235), the Secretary was seeking the "preparation of a model lease."

The Company approached the annual charge negotiations with equal care. On the one hand, there were a number of other matters to be bargained out, and a competing consortium was negotiating for the same license. The greater the rental that could be maintained without making the project uneconomic, the greater the Company's advantage

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\* The first Federal Power Commission consisted of the Secretaries of War, Interior and Agriculture. 41 Stat. 1063.

over the competitor, and the greater its advantage in negotiations over other provisions of the license. See Report, pp. 32-37, R. 8260-8265. On the other hand, too large a fixed rental charge, or a provision for readjustment of charges too uncertain for reliable business judgment, would make financing difficult and other opportunities for the investment of the Company's resources more attractive.

As it happened, the annual charge provisions became crucial. The Company's initial proposal in 1929, based upon arrangements theretofore standard in public land leases, was unacceptable to the Secretary, and his counterproposal was unacceptable to the Company. Report, pp. 9, 37, R. 8238, 8266. By 1930, this had become virtually the only issue remaining, since early in that year the Commission had decided that the license should go to the Company, rather than the competing applicant, "provided satisfactory terms of Indian rental could be agreed upon." Report, p. 49, R. 8277. The Company, the Secretary, the Commission, and, by request, the War Department, all formulated proposals for fixing and readjusting the annual charges.

The Commission's proposal included a provision that would have given it somewhat the same jurisdiction over readjustments that it now asserts. Report, p. 63, R. 8291. Its proposal was not adopted. According to the Report (p. 51, R. 8279):

"four months of negotiations were consumed in discussing those various plans and the variables upon which they were based and we were never able to reach an agreement. Several deadlocks actually developed with the breaking off of negotiations. Finally efforts on these lines were abandoned and a new approach was entered upon with the plan of a flat rental."

The proposal that finally won acceptance—and became Article 30(D) of the license—was made by the Secretary of the Interior (Report, pp. 52-53, R. 8280-81). His readjustment provision, unlike the Commission's proposal, entrusted to none of the three parties to the license—Com-

pany, Commission, or Secretary—a controlling voice in calculating new charges 20 years in the future. Instead, failing agreement among those parties, recourse would be had to an arbitrator who would be guided by the considerations and principles elaborately developed in the original tripartite negotiations. The Commission accepted the Secretary's recommendation without change, and the license was duly offered to and accepted by the Company. Both by its own terms (Article 41, App. B, p. 16a) and by Section 6 of the Act (App. A, p. 1a) it could thereafter be changed only "upon mutual agreement between the licensee and the Commission."

**2. Section 28 of the Act Was Intended to Guarantee That the Negotiations Would Be Meaningful and the Resulting License Would Be Controlling.**

The full significance of the negotiations outlined above requires a recognition of the nature and purpose of Section 28 of the 1920 Act (p. 12, *supra*; App. A, p. 3a), which guarantees that no amendment to the Act "shall affect any license theretofore issued." Had this guarantee been absent, so that the results of the negotiations could be undone—as the Commission now asserts—before the license term was half over, and the Company could thereafter be bound to pay an annual rental unilaterally determined by one or the other of the parties with which it had negotiated, the Company would not have accepted the license. The course of the negotiations leaves room for no other conclusion.

But Section 28 *was* in the Act, and is in it today. Its language, as the legislative history makes clear, was no *pro forma* technical appendage to the Act. Rather, Congress explicitly conditioned the Commission's authority to require payment of annual charges upon effective protection of the right to rely on the terms of the license that was negotiated. The words of Section 28 mean exactly what they say.

The significance of Section 28 is underscored by the situation that existed before it was enacted in 1920. Until



then, the development of water power on navigable streams by private investment was governed by the General Dam Acts of 1906 and 1910. 34 Stat. 386; 36 Stat. 593. Both Acts provided (Section 7) that—

“the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all dams which may be constructed in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any dams which have been constructed in accordance with its provisions.”

On public lands, the Secretary of the Interior issued revocable permits for water power development under the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959. *See* 56 Cong. Rec. 9109-10, 9115, 65th Cong., 2d Sess. (1918).

Under these conditions, despite rapidly increasing needs and the exhaustion of other sources of power, no substantial private development of water power was undertaken. *See* S. Rep. No. 179, 65th Cong., 2d Sess., 2-3 (1917); H.R. Rep. No. 61, 66th Cong., 1st Sess., 2-5 (1919).<sup>\*</sup> The reason was stated in the Senate Report on water power legislation in the 65th Congress (S. Rep. No. 179, pp. 2-3):

“The prime reasons which have prevented the development of water power energy in the United States is found in the restrictive policy of the present statutes

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<sup>\*</sup> The passage of the Federal Water Power Act of 1920 spanned two Congresses. In the 65th Congress, the so-called Shields Bill was reported without hearings and passed by the Senate. A new bill, drafted by the Secretaries of War, Interior and Agriculture, was reported after extensive hearings and passed by the House. Conferees agreed upon a compromise, which was approved by the House but failed to come to a vote in the Senate. In the 66th Congress a bill incorporating the conference bill of the previous Congress was reported to the House with a reference to the previous hearings, passed by the House, passed by the Senate with amendments, and the conference compromise was adopted. There are thus one set of hearings, six reports, and two rounds of debate upon this legislation. *See* First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152, 180 n. 23 (1946).

concerning the matter, which experience has shown to be practically prohibitory of it. . . . The [General Dam Act] provides for and authorizes conditions upon which the permit may be granted that render the terms of the investment so uncertain and the continuance of the permit or tenure of title so defeasible that those having capital cannot safely and will not make investments under them."

A decade of efforts to find a solution had foundered on disputes as to the right of the Government to exact charges for private power development. See H. Rep. No. 61, p. 4; 57 Cong. Rec. 4638 (1919). The overriding purpose of the new legislation, therefore, was to dispose of that controversy, and to provide a mechanism for providing investment certainty—to develop, in the words of the House Report (No. 61, p. 4), the

"hundreds of thousands of horsepower which could and would be developed in the immediate future if there were authority to offer reasonable security to the investment."

*See Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 251, n. 15 (1954).

Since it was the annual charge provisions and the correlative provisions designed to offer security to investors in water power development that received primary attention throughout the hearings and debates on the act,\* the legislative history is uniquely helpful in determining whether Congress authorized the Commission's action in this case.

The hearings reveal full Congressional awareness, both that the Commission might wish to change the manner of readjusting annual charges without the licensee's consent, and that the possibility of such a unilateral change would defeat the purposes of the legislation. Several provisions

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\* The other major subject of debate was the so-called "recapture clause," specifying the terms of compensation or continuation after the end of the license term.

of the Act were designed to insure that the legislative purpose was not thus thwarted.

First, the licenses to be issued were to be treated as contracts, rather than as the permits which had been issued under prior laws. Section 6 of the Act provides that "Licenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the Commission. . . ." App. A, pp. 1a, 5a. The binding, contractual nature of the license was referred to repeatedly by both committee members and Administration spokesmen for the bill during the hearings, as in the following exchange (Hearings on Water Power, 65th Cong., 2d Sess., p. 465):

"Mr. Haugen: The question is whether it should be made for a certain term or made perpetual. If you say it can be renewed for certain definite periods, that makes it a perpetual lease, it seems to me.

"Secretary Lane: I would not think so. I think you have got to say that if the Government wants a project for itself or another licensee, this comes to an end at the end of 50 years and then we start with a new deal.

"Mr. Haugen: If we fix the terms now you start with a new deal. My idea would be that the contract—and *this license is a contract*—should be made for 50 years, and at the end of 50 years that terminates the contract, and then we must trust to future Congresses as to what terms shall be fixed for the renewal of the license." (Emphasis added.)

The framers of the Act were clear that the Commission was to have no *authority* to take any action prohibited by the terms of the contract, as in the following exchange with Mr. Merrill, an Administration spokesman (Hearings, pp. 72-73):

"Mr. McLaughlin. Is there any authority here, or will there be if this bill becomes a law, by which the commission can change or modify a license after it is issued and accepted?

"Mr. Merrill. Not except with the free consent of the licensee. It could not be done without his consent."

The first Annual Report of the Commission (1921, p. 50) recognized that Congress had authorized the creation of contractual relationships in the licenses to be negotiated, and that its authority was limited accordingly.

Second, the manner in which annual charges could be readjusted at the end of the first 20-year period and thereafter was explicitly made a matter of negotiation and agreement in the license, and therefore subject to the safeguards afforded the licensee by his right to rely on the license terms. This treatment of annual charges was contrasted with such matters as consumer service rates, which were to be subject to continuous adjustment and change by the Commission or appropriate state utility commissions. See Hearings on Water Power, *supra*, pp. 34, 60-61.

Third, and contrary to prior law, the terms of the contract were expressly protected, in Section 28, from alteration even by Congress itself. This was as the sponsors of the legislation wished (Hearings on Water Power, *supra*, p. 73):

“Mr. Esch (interposing). Before you go to that let me ask a question. The language you just read, Mr. Merrill, would indicate that the terms of the contract must be interpreted in the light of this act. Therefore, that interpretation would obtain for a period of 50 years. Do you think that Congress can pass no act within 50 years that will affect the terms of the license or add to its provisions?

“Mr. Merrill. I think that it should not have authority to pass subsequent legislation that will modify the contract already executed.” \*

When the bill reached the floor of the House, the change from prior policies evoked some opposition. An amend-

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\* Indeed, so categorical was the language of Section 28 that a representative of the Montana Power Company suggested an amendment to permit subsequent legislation favorable to the licensee to “affect” the license (Hearings on Water Power, *supra*, p. 305). The suggestion was not adopted.

ment was offered to remove this protection of licensees and, in effect, to continue the provisions in the General Dam Acts with respect to Congressional authority to modify executed licenses. The amendment was rejected. 56 Cong. Rec. 10037.

**3. The Rejection by the Commission of Both the License and the Statute Is Not Supportable.**

As is apparent from what has been said, the Commission's refusal to abide by the readjustment provisions of the license strikes at the heart of the legislative policy carefully considered by Congress in enacting the Federal Power Act, as well as the accord reached in the negotiations over the license itself. Such violence to basic principles of repose should have a very weighty justification indeed. On the contrary, the Commission's opinion presents no relevant argument or authority. The Commission begins by stating (R. 10064) that:

"If, however, the method of determination of annual fees is procedural rather than substantive in nature, then Congress may from time to time describe or change that procedure without abrogating constitutional rights."

With due deference, this reflects a complete misunderstanding of the issue. We are concerned here with what Congress *did*, not with what it *might have done* without exceeding its powers under the Constitution.\* What Congress *did*, in Section 28 of the 1920 Act, was to provide that *no future amendment* "shall affect" any outstanding license, or "the rights of any licensee thereunder." Section 28 has never been amended, and has been carried over intact into the Federal Power Act. There is nothing to

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\* The Commission, in connection with another 1935 amendment relating to annual charges payable to the United States, has recognized that Congress did not intend to affect existing licenses, and followed the terms of the license rather than the amended act. Annual Charges Payable By Licensees, 31 F.P.C. 1555 (1964).

which the Commission refers that suggests that Congress intended to except "procedural" provisions from the "shall not affect" language, or that Congress intended to limit the "rights of any licensee," which were to be inviolate, to "substantive" rather than "procedural" rights.

The legislative history of Section 28, as outlined above, is expressly to the contrary of the Commission's statement. The Commission's interpretation is inconsistent with the clearly expressed basic purpose of the Act—to offer investment security not provided by prior laws in which Congress retained the right to modify permits. Subjects which were made a "matter of contractual relationship" were to be respected through the license term, so that investors would know where they stood, and the manner of readjusting the charges was expressly made "a matter of contractual relationship"—a subject of negotiations, of exchange and compromise in a context of other subjects dealt with in the licenses.

A suggestion that the results of one part of these negotiations—no matter how important that part had seemed to the parties, no matter how they had tailored their various demands and acceptances to that part—would not be respected by Congress because it concerned "procedural" rather than "substantive" matters, or a suggestion that the Commission could come to Congress later to get what it had conceded in negotiations, would have been unthinkable. Any intimation of such reservations about the meaning of Section 28 would have shown that the bill was not really intended to safeguard the results of the negotiations.

Similarly, there is nothing in the legislative history of the amendment of Section 10(e) in 1935 to lend credibility to the Commission's assertion that Congress intended to modify the terms of outstanding licenses. The Solicitor of the Federal Power Commission, the Administration spokesman, describing the amendments to Section 10(e) at

the hearings as "self-evident" and "clarifying," did not deem them important enough to discuss with the Committee. Hearings on H.R. 5423, 74th Cong., 1st Sess., p. 486 (1935). The same assumption was reflected in the House Report (H. Rep. No. 1318, 74th Cong., 1st Sess.):

"This section contains several minor and clarifying amendments to section 10 of the act, which deals with the conditions upon which licenses *are to be issued*." (Page 24; emphasis supplied.)

The Senate Report (S. Rep. No. 621) is virtually identical.

Surely no implied *pro tanto* repeal of Section 28 can be drawn from this material. For future licenses—which "are to be issued"—Congress was removing from the license negotiations the manner of readjustment of annual charges. The difference between this, the obvious meaning of the 1935 amendment, and the meaning the Commission would ascribe to it, is the difference between "revising and perfecting" \* the Act in the light of experience in its administration, and striking at the heart of its basic policy of reliance upon the negotiated provision of a license. Whatever may be the significance of the amendment in post-1935 dealings between the Commission and prospective licensees, if applied to an existing license embodying an interdependent set of compromises produced by the give and take of negotiation, the change would unravel the whole. What would be lost would not simply be the single license provision affected, but all that had been given up as a consequence of insisting on that provision. No member of Congress would fail to see that such retroactive application of the amendment would make it a major issue of policy. The amendment could be described and treated as "minor" only because Section 28 continued to make it clear that the amendment had no application to licenses already executed.

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\* First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152, 172 n. 17 (1946), commenting on the effect of the 1935 amendments to the Act.



Against the plain teaching of both the language of the Act and its legislative history, the Commission turns for support to two cases: *Pennsylvania Power & Light Co. v. FPC*, 139 F.2d 445 (3rd Cir. 1943), *cert. denied*, 321 U.S. 798 (1944); and *Safe Harbor Water Power Corp. v. FPC*, 179 F.2d 179 (3d Cir. 1949), *cert. denied*, 329 U.S. 957 (1950). The Commission asserts that the Third Circuit in these cases has held that other 1935 amendments modified the terms of outstanding licenses, despite Section 28, and that the section can therefore be ignored here. The Third Circuit held nothing of the sort.

In the *Pennsylvania Power & Light* case, the Commission, exercising its authority under Section 4(a) of the Act to determine the "actual legitimate original cost" of a project, disallowed certain items claimed by the licensee and directed the licensee to conform its books of account to such determination. The power of the Commission to do so was sustained by the Court, as indeed it had been in similar cases prior to the 1935 amendments. *E.g.*, *Clarion River Power Co. v. Smith*, 61 App. D.C. 186, 59 F.2d 861 (1932). The Company, however, apparently urged that since its license was issued before 1935, it was protected against a Commission determination of "actual legitimate original cost" under Section 4(a) because it was not until 1935 that the Commission was accorded the power to determine "net investment" for purposes of recapture by the United States at the end of the 50-year license term under Section 14. *See* 139 F.2d at 453. The Court properly dismissed the argument as irrelevant. That issue—whether the 1935 amendments could and did change the methods of determining the amounts payable to a licensee at the termination of its 50-year lease—has not arisen, and presumably will not until at least 1971. The case is clearly of no authority on the question whether Congress intended the 1935 amendments to Section 10(e) to apply to existing licenses.

The second case relied on by the Commission—the *Safe Harbor* case—involves another aspect of water power development which the 1920 Act committed to public regulation rather than negotiations—service rates to consumers. Under Section 20 of that Act the Federal Power Commission was authorized under some circumstances to establish such rates. Otherwise the Act left the establishment of such rates to state utility commissions. In 1935, Section 20 was carried over without change, and in addition the Commission was by Section 206 vested with new authority to regulate rates of service by companies transmitting or selling electric power in interstate commerce at wholesale, such companies being “public utilities.”

In 1940, the Commission undertook to regulate the rates of Safe Harbor under the authority given it by the pre-1935 provisions of Section 20. In *Safe Harbor Water Power Corp. v. FPC*, 124 F.2d 800 (3d Cir. 1941), the court held that the Commission had not satisfied the jurisdictional requirement of that section, which required that interested states had either declined or refused to cooperate in regulating the rates through their own commissions. Following that decision, the Commission again sought to regulate the company's rates, purporting this time to act under both Section 20 and Section 206. It is this decision, which sustained the Commission, on which it now relies.

In its opinion on the second appeal the court first reviewed the question whether Section 206, added in 1935, had by implication repealed Section 20 of the 1920 Act. After careful analysis of both the original and the new provisions for the setting of service rates, the court concluded (179 F.2d at 189) that “regulation of rates under Section 20 was substantially the same as regulation under Section 206.” In reading “Section 206 as if the provisions of section 20 were a part of it,” the court noted, “the requirements of section 28 are met.” 179 F.2d at 188.

But the court did not stop at finding that the rates set under Section 206 would be no different from those set under Section 20. Because Safe Harbor was a licensee with rights preserved under Section 28, the court next examined the terms of the license to determine whether anything therein was inconsistent with the authority accorded the Commission by the court's construction of the statute. 179 F.2d at pp. 188-89. Finding no inconsistency, the court then examined whether the Commission had jurisdiction to act under Section 20 (the question on the first appeal), since "regulation under Section 206, because Safe Harbor is a licensee under Section 4, must be exercised with due regard to the provisions of Section 20." 179 F.2d at 189. The court concluded that on the new record, the Commission was warranted in finding that the states were unable to agree on regulation, and the Commission could therefore exercise the authority under Section 20.

Thus the holding in *Safe Harbor*, rather than supporting the Commission's position here, in fact prohibits what the Commission seeks to do. Under *Safe Harbor*, only amendments that incorporate and continue the provisions of the Act originally applicable to the licensee can be enforced by the Commission consistently with Section 28. Here, the 1935 amendment on which the Commission relies changed the prior act.

**4. Even on the Commission's Assumption As to What Congress Did by the 1935 Amendment to Section 10(e), It Lacks Jurisdiction.**

As we have pointed out above, there is no warrant in the legislative history of the 1935 amendments to Section 10(e) for the conclusion that Congress intended to "affect" the rights of then existing licensees. The Commission, however, ignoring what Congress *did* do, devotes much of its opinion to a discussion of what Congress *could* do without violating constitutional guarantees. On the erroneous assumption that Congress had in 1935 sought to ignore Sec-

tion 28, the Commission argues that it could constitutionally do so, since the change from negotiation and arbitration to unilateral administrative determination was "procedural" rather than "substantive." R. 10065. Although we believe it unnecessary for the Court to reach this question, the Commission's position will not stand analysis.

The Commission does not challenge the principle that legislation cannot constitutionally defeat vested contract rights, even when they vest by virtue of prior legislation, unless the right to do so is expressly reserved. *Wood v. Lovett*, 313 U.S. 362 (1941); *Treigle v. Acme Homestead Assn.*, 297 U.S. 189 (1936); *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819); cf. *South Carolina Electric & Gas Co. v. FPC*, 338 F.2d 898, 901 (4th Cir. 1964). At the same time, it is equally well settled that a party to a contract cannot demand the preservation of the same governmental machinery for the vindication of his rights vis-a-vis other parties that was extant at the time he entered his contract. Government structure would be effectively frozen forever. Cf. *El Paso v. Simmons*, 379 U.S. 497, 514 (1965). Consequently, entry into a contract does not vest a party with a right to a specific procedure for the enforcement of contract rights, so long as those rights can be enforced. This is the "substantive/procedural" criterion applied in judicial review of statutes that are found to "affect" contracts. *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *Home Loan Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 430 (1934); *Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437 (1903).

Application of this doctrine thus requires analysis of the contract. If the right claimed is one vis-a-vis other parties to the contract, its elimination cannot be viewed as merely a change in the mechanism for its enforcement. *W. B. Worthen Co. v. Kavanaugh*, *supra*. If the right claimed is the more general one, against the state for the

maintenance of particular institutions, then a modification may be justified. For example, in the first *Safe Harbor* case, 124 F.2d 800, 804 (3d Cir. 1941), the court held that even as to prior licensees the Congress might substitute review of the Commission's service rate determinations by a court of appeals for review by a three-judge district court.

The right at issue in the present case is that of the Company to require the other parties, the Commission and the Secretary, to arbitrate the readjustment of annual charges, if negotiation is unsuccessful. This is a right which the parties, if they will, can perform without the aid of specific institutions of government. Under the Commission's decision this right to arbitration cannot be enforced at all. The question posed by the Commission is not *how* this right will be enforced, but *shall* it be enforced. The answer in the Constitution is clearly "yes," for one party loses an important part of his bargain—freedom from a unilateral decision by one of the parties.

The same question has been presented in other contexts, always accompanied by the argument that nothing really is lost if arbitration is omitted. The language of "substance" and "procedure" is misused, as the Commission misuses it here, to lend plausibility to the argument. Arbitration, it is said, is merely a procedure for arriving at a substantive result—a salary, a wage scale, a price—which could as well be reached in some other manner.

The courts have forcefully rejected such arguments and have established that arbitration is a right of great importance. In *Bernhardt Co. v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956), the Court held that arbitration is not "merely a form of trial," but—

"substantially affects the cause of action created by the state. . . . The change from a court of law to an arbitration panel may make a radical difference in ultimate results." 350 U.S. at 202-03.

Therefore, the revocability or enforceability of an arbitration clause was a matter of—

“substantive rights, which *Erie R. Co. v. Tompkins* held were governed by local law,” and not “a mere form of proceeding within the power of the federal courts or Congress to prescribe.” 350 U.S. at 202.

In *Bernhardt* the United States Arbitration Act did not apply to the contract in issue. In *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *writ dismissed*, 364 U.S. 801 (1960), the Arbitration Act did apply, and the question presented was whether the right to arbitration was a right to a federally prescribed procedure to be followed only if the agreement to arbitrate was valid under the substantive contract law of the appropriate state, or whether the right to arbitration was a substantive contract right, the validity of which was to be determined by substantive federal law. The court concluded that it was the latter. 271 F.2d at 409.

Indeed, the Commission's attempt to distinguish between the “procedural” and “substantive” terms of the license misconceives basic contract law as well as constitutional doctrine. A clause that is apparently “procedural” may be viewed by the parties as a substitute for agreement on the “substantive result” toward which the clause is directed. In the course of bargaining, a “procedural” concession on one matter may be accepted in lieu of “substantive” concessions on other matters, and thus in a real sense as a substitute for them. Here, a binding, self-executing formula to determine readjusted rates might have been achieved after many more months of negotiations. Instead, the parties agreed upon arbitration. In contract law there can be no distinction between kinds of terms, since each is a product of a bargain. As the court in *Robert Lawrence* observed (271 F.2d at 408):

“Whether the bargain [to arbitrate] evidenced by the contract or agreement is or is not valid cannot differ from the question of whether any other meeting of the minds of the parties will be recognized as having created certain rights.”

### B. The Commission's Assertion of Jurisdiction Raises Grave Issues as to the Jurisdiction of This Court

The Secretary of the Interior, who was permitted to intervene in the proceedings before the Commission, has consistently taken the position that he possesses a power to accept or reject the determination as to the adjusted annual rentals as they may finally be determined in this proceeding.\* As the dissenting Commissioner was aware (R. 10088-89, 10092, 10159-60), this assertion by the Secretary of an executive department veto over the decision of this Court raises the most serious constitutional questions—questions which relate to the very jurisdiction of this Court itself. These questions are avoided, however, if the Company's reading of the statute and the license is accepted. We believe that the Court can properly regard the need to avoid these constitutional issues as a further substantial reason why the Commission's position should be rejected. *Crowell v. Benson*, 285 U.S. 22, 62 (1932); cf. *Glidden v. Zdanok*, 370 U.S. 530, 582-583 (1961).

### I. The Constitutional Issues Are Substantial.

When the Company's license was finally agreed to in 1930 there was, as noted above, a 1928 law applicable particularly to the Flathead Reservation, which gave the Secretary of

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\* In a response to a Company motion for a subpoena the Secretary stated:

"After . . . the proceeding has reached its conclusion, including the exhaustion of appellate procedures, the Secretary then has a responsibility to determine whether the Commission's findings should be accepted or rejected." R. 9631-32. (Emphasis supplied.)

After the Commission had issued its order, the Secretary informed it by letter—

"We would not, in the discharge of our trust and other statutory responsibilities to the Tribes, interpose any objection to the October 4 order if it is retained in its present form." R. 10099. (Emphasis supplied.)

See also R. 22, 31-32, 54-56, 73-74, 1560A-66A; Secretary's Brief Opposing Exceptions p. 12, R. 10021; Secretary's Opening Brief to the Examiner, pp. 7, 21, 22.



the Interior a position in the negotiations apart from his *ex officio* membership on the Commission as then constituted. That law (Act of March 7, 1928, 45 Stat. 210, 212-213) provided:

"That the Federal Power Commission is authorized in accordance with the Federal Water Power Act and *upon terms satisfactory to the Secretary of the Interior*, to issue a permit or permits or a license or licenses for the use, for the development of power, of power sites on the Flathead Reservation . . . ."

This act made mandatory a tripartite negotiation over the terms of the license, and required the Secretary to agree to the manner of determining the readjusted payments set out in Article 30(D), which he did. The 1920 statutory scheme then in effect made the method of readjustment a consensual matter rather than a question subject to authoritative determination. The Commission, relying on the 1935 amendments, contends that readjustment is now a question for authoritative determination—at least so far as concerns the Company, but does not challenge the assertion of the Secretary that readjustment remains for him a consensual matter.\* The refusal of the Commission to face up to the consequences of this position evoked Commissioner Carver's dissent.

There is the greatest doubt that the jurisdiction of this Court could be sustained were the reading of the statutory scheme by the majority of the Commission and by the Secre-

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\* In addition to the Act of March 7, 1928, the Secretary relies on a complex of other statutes to sustain his position. Act of June 30, 1834, Rev. Stat. § 2116, 25 U.S.C. § 177; Act of March 3, 1909, 35 Stat. 797; Act of June 25, 1910, 36 Stat. 858; Rev. Stat. 463, 25 U.S.C. § 2. Brief Opposing Exceptions p. 12 n. 4, R. 10021. As counsel for the Secretary stated before the Commission, his "power is derived from accounts, responsibilities, fiduciary obligations, outside of the Federal Power Act." R. 1560A. Beyond these statutes and decisions concerning his trust responsibilities such as 36 Ops. Attn'y Gen. 98 (1929) and *United States v. Creek Nation*, 295 U.S. 108 (1935), the Secretary finds support for his position in section 4(e) of the Federal Power Act and Article 41 of the license. R. 9632, 10021-22.

tary to be accepted. Federal courts cannot accept jurisdiction to make determinations that may legally be reviewed and rejected by the executive. *Hayburn's Case*, 2 Dall. 409 (1792); *United States v. Ferreira*, 13 How. 40 (1851); *Gordon v. United States*, 117 U.S. 697 (1864); *In re Sanborn*, 148 U.S. 222 (1893); cf. *Muskra v. United States*, 219 U.S. 346 (1911). The Supreme Court, in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), applied this principle in a modern administrative context. The Civil Aeronautics Act makes the issuance, denial or amendment of a certificate of public convenience and necessity by the Civil Aeronautics Board, after regular hearing procedures, subject to the approval of the President in cases where the carrier is foreign or where a domestic carrier seeks to operate on a foreign route. In the *Waterman* case, rival domestic carriers had applied for a foreign route, and the unsuccessful applicant sought judicial review. The Court of Appeals for the Fifth Circuit, disclaiming any power to review the discretion vested by the statute in the executive branch, purported to review the Board's order on the theory that the Board's functions were separate from those of the President, and the Board's order could be resubmitted to the President after the Board's determinations had been reviewed. The Supreme Court, however, ordered the petition for review dismissed for want of jurisdiction. The Court agreed that a literal reading of the Civil Aeronautics Act made the decision reviewable, but pointed out (333 U.S. at 112-113) that—

“administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. . . .”

Where the executive retains a veto power—

“if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments

within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government. . . . It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." 333 U.S. at 113-114.

Here, too, the judicial review provisions seem to give this Court jurisdiction to review a Section 10(e) order readjusting Indian rentals. Here, by virtue of the 1928 Act and other statutes, the Secretary of the Interior claims the power to veto any judgment of this Court, or the Supreme Court, if it should, pursuant to the statute, issue a decree "modifying, or setting aside, in whole or in part" the present order of the Commission. Here, as in *Waterman*, or in *Hayburn's Case*, where the Secretary of War could veto a judgment if he believed there was "mistake" or "imposition," or in *Ferreira*, where the veto power of the Secretary of the Treasury was to be guided by "justice and equity," or in *Gordon*, where the Secretary of the Treasury was to be guided by budgetary considerations, exercise of executive discretion is necessarily unreviewable. Here, as in those cases, the Secretary asserts that he will be guided only by his trust responsibilities in determining whether to consent to the judgment of the courts.

The issue cannot be avoided, as the Commission sought to do, by relying on the letter from the Secretary accepting the order in its present form. The Secretary's letter of conditional approval does not make this a "final order" any more than the President's approval before judicial review in *Waterman* made that order "final." Nor can the Court defer the issue until it has determined whether the order should be "affirmed"—and thus continue acceptable to the Secretary—or "modified or set aside, in whole or in part." As the Supreme Court stated in *Waterman*, "if

the President *may* completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render." 333 U.S. at 113. (Emphasis supplied.) This Court cannot, in other words, be put in the position of making a decision which will be final if it agrees with the Government, and not final if it disagrees.\*

Nor is the Court in a position, if the Commission is to determine the readjusted payments, to deny that the Secretary has the veto power which he claims.\*\* The Secretary is not before the Court, and would not therefore be bound by the Court's decision, even were it appropriate to seek to determine his powers *in absentia*.\*\*\*

## 2. These Issues Can Be Avoided by Enforcing the Terms of the License.

All of those questions may be put to one side if the negotiation and arbitration provisions of the license are applied. These provisions were established by—indeed, proposed by—the Secretary, and accepted by the Commission and the Company. The license was drafted in light

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\* Although the issue is of course not before the Court, it is apparent that were this Court without jurisdiction to review the Commission's order, the order itself would be a nullity. There is no evidence whatever that Congress intended to give the Commission an unreviewable power to enforce an order levying upon the Company's property. Moreover, such an order would not be constitutionally enforceable if the Company could not contest its legality except at the risk of suffering the harsh criminal, civil and forfeiture penalties of Sections 820 and 825(n) and (o) of the Act. See *Ex parte Young*, 209 U.S. 123, 148 (1908); *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920); cf. *Yakus v. United States*, 321 U.S. 414 (1944); *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300 (1937).

\*\* In the prior proceeding in this Court involving the third unit, where these questions were not presented or decided, this Court noted in passing that the Secretary "has a veto power." *Montana Power Co. v. FPC*, 112 App. D.C. 7, 10 n. 2, 298 F.2d 335, 338 n. 2 (1962).

\*\*\* While the Secretary was a party-intervenor before the Commission, the Commission is not vested with power to determine whether or not he has the veto power he claims. Thus the problem would not be avoided by the suggestion of the dissenting Commissioner that the Commission should consider the question.

of the 1928 statute, which accords the Secretary the special, independent position so incompatible with the Commission's present assertion of unilateral power. The license provision reflects the fact that the Secretary had a veto power over the rental level set in 1930, when the Company had the option of not entering into the license. *Cf. Montana Power Co. v. FPC, supra*. The Secretary's suggestion before the Commission (Brief Opposing Exceptions, pp. 12-13, R. 10021-22; Oral Argument, R. 1566A-67A) and the Examiner, (Opening Brief, pp. 21-22) that he would equally have a veto over the arbitration award is pointless; if he could veto an award increasing the present annual payments, the effect would be to leave the payments at their present level, and as trustee for the Tribes his interest is in the highest payment possible. In any event, were such a veto attempted and not respected, a suit by the Secretary to establish his veto power would provide a judicial forum in which the issue could be settled, since the court would have jurisdiction over him as a party.

We submit, therefore, that for all of the above reasons, the Court should remand the case to the Commission with instructions to enter into negotiations with the Company and the Secretary of the Interior on an appropriate adjusted rental, and if such negotiations are unsuccessful, to submit the matter to arbitration as provided in the license.

## II.

### **IN ANY EVENT, THE ADJUSTED ANNUAL CHARGE FIXED BY THE COMMISSION MUST BE SET ASIDE.**

For the reasons stated in Point I, we believe the Court will find it unnecessary to review the Commission decision on the merits. If the Court does reach that issue, however, we believe that the adjusted annual rate fixed by the Commission is arbitrary and unreasonable, and the bases upon which the Commission reached its conclusion are in several respects beyond its authority.

**A. The Commission Exceeded Its Authority in Determining the Adjusted Annual Charges as a *de novo* Matter.**

Section 10(e) of the Act authorizes the rentals "fixed" at the beginning of the license term by negotiation, to be "readjusted" at the end of 20 years. The term "readjust" is not a synonym for "fix anew." It means, rather, both the continued use of the original standards, and a beginning of the inquiry with an inquiry into the present reasonableness of the rate which had resulted when the standards were originally applied.

The Commission, in issuing this license in 1930, fixed a reasonable annual charge for the use of Tribal lands based upon a commercial value for their most profitable purpose—power development. That charge was found to be \$175,000 per year for two units and, from 1954, an additional \$63,375 for the third unit. Thus, a reasonable annual charge had been established, and it was incumbent on the Commission to make a finding, not only that such an annual charge was no longer reasonable, but why it was not. Having done so, the Commission would be in a position to readjust the annual charge to take into account the changed conditions that made the previously reasonable charge no longer reasonable.

This the Commission refused to do. The Commission recognized the relevance of the original standards, but ignored the amount of the original charge, insisting, rather, that "the entire analysis must be made *de novo*" (R. 10075). Its position is clear. Noting (R. 10074) that "section 10(e) . . . provides that the Commission shall 'fix a reasonable charge for the use thereof,'" the Commission's opinion concludes, citing the decision of this Court in the Third Unit case, that the only statutory standard is "reasonableness." R. 10074, 10079. The Commission thus fails to recognize that this is *not* a proceeding to "fix a reasonable annual charge"—a proceeding which occurs when a new license is issued, as in the Third Unit case. The

relevant language of Section 10(e) is rather the statement that "such charges may be readjusted." This Court, in the Third Unit case, did not have the question of statutory standards for *readjustment* before it at all.

That question was before this Court, however, in *California Oregon Power Co. v. FPC*, 99 App. D.C. 263, 239 F. 2d 426 (1956), in which the readjustment under Section 10(e) of charges for the use of a government dam was in issue. The Court stated:

"[The Commission's] power to readjust charges for use of a Government dam is not unfettered. . . . Section 10(e) provides for readjustment of charges 'at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter.' Thus the only 'obligation' imposed upon Copco by Article 35(d) is to pay for use of a Government dam after twenty years *if* the present charge becomes unreasonable, and then (if would seem) only *if* the Commission prepares an adequate record showing what surplus water is, how much is being used, and what charge is to be imposed." 99 App. D.C. at 268, 239 F.2d at 431.

The finding thus required in a Section 10(e) readjustment proceeding—that the current charges are unreasonable—was never made by the Commission in this case, doubtless because it recognized that such a finding would have to be accompanied by reasons *why* the current charges are unreasonable, which would then have provided guides for moving from the current level to a different level for the future.\* For the Commission, only *future* readjustments are to be made in this way. Referring to a possible further readjustment in 1969, it stated that "such a [future] readjustment will be made only if it is demonstrated that the charge here set is inappropriate." Opinion, p. 15, R. 10075.

\* A detailed finding of the unreasonableness of the charges in 1969, as a prelude to readjustment, would of course have been embarrassing insofar as it pertained to the \$63,375 rental for the third unit, which the Commission had found reasonable in 1961.



For this "readjustment," however, the Commission has undertaken a "*de novo* analysis," which assures that none of the circumstances, commitments and arrangements that accompanied and followed the original bargain will have a place in the new determination. The Commission also ignored the principles established during the original negotiations, which the contemporaneous record in the Scattergood Report shows were intended to control readjustment. Report, pp. 9, 53, 63, R. 8238, 8282, 8292. This indeed was one of the reasons why that report was prepared and published. The *de novo* method of calculation that the Commission applied—the profit-sharing method—was expressly rejected in the original negotiations. Report, pp. 51-52, R. 8280-8281.\* On the other hand, the record does contain evidence of intervening changes which, if the Commission had made the requisite finding of unreasonableness, would have permitted a *bona fide* readjustment. Since, however, the Commission made no readjustment at all, there is no support for its determination of a *readjusted* annual rental of \$950,000, and that decision must be set aside.

**B. The Method by Which the Commission Fixed the New Annual Charges Is Unreasonable, and Unreasonably Applied.**

A second objection to the determination of the Commission that the annual rentals should be \$950,000 lies in the fact that the methods which it selected for its *de novo* determination are fatally defective. Two separate de-

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\* This was one of the reasons that the Examiner rejected that method. Initial Decision p. 20, R. 9732. The Commission's attempt to deny the accuracy of the Examiner's objection is wholly unconvincing. It relies on the word "profitable" in the clause in Article 30(D) referring to "the most profitable purpose for which suitable, including power development," and concludes from that word that "a form of profit sharing was indeed contemplated". Opinion p. 22, R. 10081. Even without the evidence in the Scattergood Report that the parties did not so contemplate, it is apparent that the phrase is intended only to insure against an argument that rentals should be determined according to the value of the land for grazing or farming. Cf. *United States v. 5,677.94 Acres of Land*, 162 F. Supp. 108, 117-18 (D. Mont. 1958).

terminations are involved. First, the Commission determined an amount which, speaking generally, can be termed the annual "value" of the project. Second, the Commission determined the proper share of the Tribes in that "value." We deal with the two determinations separately.

#### 1. The Commission's Determination of Annual "Value."

The hearing developed and applied five different methods of calculating the annual "value"—the method urged by the Company, which took into account the changes in circumstances since the original charge was fixed; the so-called "net benefits" method used to fix an original charge in the Third Unit case; a method which extrapolated from the charge for the third unit; a method which adapted a formula used in the most recent power licenses involving the use of Indian lands; and the so-called "profitability" method finally adopted by the Commission. The Examiner chose the "net benefits" method (Initial Decision p. 23, R. 9735) and exceptions to his choice and application of that method were taken to the Commission. The Commission rejected the Examiner's method, and—necessarily without the benefit of exceptions and argument\*—chose the "profitability" method.\*\* This choice, we believe, is both arbitrary and

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\* The Commission, itself recognizing "the complexity and uncertain allocations involved" in applying the "profitability" method, stated that "no party has excepted to the manner in which this analysis was performed" by the Tribes' witness, Van Scoyoc. Opinion p. 21, R. 10080. The short answer is that since the Examiner had himself rejected Van Scoyoc's approach, the Company was under no obligation to except to his analysis. *Sunray DX Oil Co. v. FPC*, 351 F.2d 395, 400 (10th Cir. 1965).

\*\* In a footnote (Opinion p. 22 n.8, R. 10081), the Commission remarks that it believes the same results would have been reached by "the most reasonable" calculation under the net benefit method. This is not only not a finding, but also it ignores the many difficult questions which the Commission recognized (Opinion p. 21, R. 10080) were involved in the application of that method and presented by the parties' exceptions to the Examiner's decision. If the "profitability" method is defective, as we urge, the Commission's determination fails. *Miss. River Fuel Corp. v. FPC*, 82 App. D.C. 208, 224, 163 F.2d 433, 449 (1947); see *Democrat Printing Co. v. FCC*, 91 App. D.C. 72, 78, 202 F.2d 298, 303 (1952).

unreasonable, and requires the Commission to enter into areas that are well beyond its proper authority."

a. *The Commission's Method of Assigning Earnings to Project No. 5 Is Arbitrary and Unreasonable.*

The "profitability" method seeks to measure whether there were profits produced specifically by Project No. 5 above a fair return on the investment in those works, and, if so, their amount. R. 623; Opinion p. 19, R. 10078. Since the Company's revenue from the sale of electric power is not traced in its accounting to particular pieces of its equipment, the Commission recognized that application of the profitability method required an attribution of income to progressively smaller parts of the Company's investment, until finally Project No. 5, together with its income, was isolated. In an interrelated, income-producing system of productive assets, however, there is no way of determining, *ex post facto*, how many dollars of income were produced ultimately by a particular generator, or transmission line, or typewriter. Marginal cost analysis, used for that purpose in determining whether or not to make a particular investment *in futuro*, is not applicable. Therefore the Commission assumed that each dollar of investment, whether in a transmission line or a typewriter, produced the same number of dollars of income. R. 472, 473. The Company's revenue was thus assigned to groups of assets in proportion to the Company's investment in each, and it was determined that a certain amount of the Company's income was attributable to transmission facilities, *e.g.*, high tension lines; a certain amount to distribution facilities, *e.g.*, transformers; and a certain amount to power production facilities, *e.g.*, water turbines and steam plants.\*

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\* The opinion of the Commission, while it does not detail the calculations under the profitability method, states that "we adopt Van Scoyoc's method". R. 10080. The details are therefore to be found in Van Scoyoc's testimony and exhibits. R. 456-76, 483-500, 502-517A; CT. Ex. 5, R. 1555-81; R. 540-565, 579-686, 792-816.

Having thus determined how many income dollars were attributable to power production facilities, the Commission arbitrarily abandoned its premise, and proceeded to allocate income among those facilities, *not* according to the investment in each, but according to the power that each produced. R. 475-76, 671-75, 681-85. This meant—to take only one example—that while the Company's investment in a steam plant contributed each year to the amount of income allocable to power production facilities, in the subsequent allocation *among* those facilities none of that income was attributed to the steam plant in a year when it was not used for power production. R. 676-78, 681; CT. Ex. 5, Schedule 2, Sheet 5, R. 1559, Schedule 4, Sheet 3, R. 1568. Thus income made available for apportionment solely by reason of the existence of the steam plant was used to exaggerate the "income" of the hydro-electric facilities, including Project No. 5. The end result was to attribute to Project No. 5 a disproportionately high amount of the Company's income (MPCo. Ex. 34, R. 1718), and \$2,254,000 of annual "excess profits."

It is, we submit, arbitrary and unreasonable thus to assume that the rate of return—the "profit"—on the dollars invested in Project No. 5 was different from the rate of return on the dollars invested in other Company assets. That assumption deprives the Commission's findings of any record support. A chain store operator may (with a few imponderables) determine the rate of return on the investment in each store, because they are identifiably separate. But in an integrated productive enterprise (R. 801-02) and particularly a regulated one whose return is limited by law to an amount related to the amount of its investment, the earnings—and hence the profit—are derived from the enterprise as a whole, with each invested dollar contributing its part.\* R. 454-55, 795-96. *See Government of Guam v. Federal Maritime Commission*, 124 App. D.C. 325, 328-29,

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\* The Commission's own staff, in urging that the profitability method not be adopted, noted that "it is beset with the inherent problem that it is not possible to segregate revenues attributable to Project No. 5 to any degree of precision." Staff Brief to the Examiner p. 48.

365 F.2d 515, 519-20 (1966), *cert. denied*, 385 U.S. 1002 (1967).

This is obvious when there are qualitative differences between the various pieces of such a company, as the Commission itself recognized in allocating income among the power producing, transmission and distribution investments of the Company. But it is no less true when the pieces are qualitatively similar, such as a water power turbine and a steam generator. The individual chain store with a fleet of delivery trucks, all needed to perform its delivery service, does not make an extra *profit* on one truck that may happen to have a larger capacity or a more efficient motor. The larger capacity of the truck which may permit the store to handle heavy loads, or that truck's greater efficiency, may be offset by the lack of capacity and lesser efficiency of the rest of the fleet, and may make economically feasible the operation of the fleet as a whole. *Cf.* R. 796-97, 800-01. All one can say is that if all the other trucks were to be replaced by efficient ones, the profit would be greater. That, of course, is familiar marginal cost analysis. But it by no means follows that one can say that the other trucks in the system, all of them necessary for the delivery service, are producing less profit, or perhaps operating at a loss. And particularly when the units involved are parts of an enterprise whose earnings are related by law to its investment dollars, to conclude that one of a number of similar units causes "excess" profits or, as the Commission asserts (Opinion p. 16, R. 10075), permits the Company to be "unjustly enriched," is simply meaningless. In a regulated industry the production and sale of more units of electricity at a lower investment and operating cost must result in lower prices, not greater profits. R. 454-55, 795-96.

Nor is the Commission's conclusion strengthened by the statements in its opinion denying rehearing that it had not really used the formula set out in its original opinion, but had picked out the curiously precise figure of \$949,731 (rounded by it to \$950,000) from the "record as a whole," and that its decision was based on the Project's role as

a "major contributor to [the Company's] earning power." R. 10160. The first comment would leave the Commission conclusion completely at large; certainly it cannot mean that the Commission reached its figure on no basis or theory at all. The facts in the record have no relevance to and do not support the Commission's findings except through its theory. *Colorado Wyoming Gas Co. v. FPC*, 324 U.S. 626, 634 (1945); *Gov't of Guam v. Fed. Maritime Comm'n*, 117 App. D.C. 296, 300, 329 F. 2d 251, 255 (1964); *Capital Transit Co. v. Pub. Util. Comm.*, 93 App. D.C. 194, 209, 213 F. 2d 176, 190 (1953), *cert. den.*, 348 U.S. 816 (1954); *Miss. River Fuel Corp. v. FPC*, 82 App. D.C. 208, 214, 219, 223-24, 163 F. 2d 433, 439, 443, 446-47 (1947). The second comment, as applied to a Company whose earning power is necessarily related to and governed by its investment, not its production of power, is irrelevant.

b. *The Commission's Treatment of Hungry Horse Benefits Is Arbitrary and Unreasonable.*

A further unreasonable and arbitrary action of the Commission in its application of the profitability method relates to its treatment of the benefits to Project No. 5 from the Government dam at Hungry Horse, Montana, upstream from the project. The present power output of Project No. 5 results in considerable measure through utilization of releases of stored water from the Hungry Horse reservoir. Indeed, it was the availability of extra water from Hungry Horse storage at low-flow seasons that made feasible the installation of the third unit with its extra generating capacity. *Montana Power Co. v. FPC*, *supra*, 112 App. D.C. at 8, 298 F. 2d at 336.

The consideration—or lack of consideration—accorded these facts by the Commission is wholly unreasonable, and indeed illegal. The proportion of the Company's income which the Commission attributes to the project is greatly inflated by reason of the project's use of Hungry Horse water, because the allocation is based on power output,

as described above. At the same time, the Commission *excludes* the cost associated with the use of this water. Under Section 10(f) of the Act (App. A, pp. 7a-8a), the Company must pay to the United States what are known as "headwater benefits," which, with the approval of the Commission, the Company treats as operating expenses. The parties stipulated that these payments totalled \$670,700 in the relevant years (R. 64-65) but that very substantial sum was not deducted from the "income" attributed to the Project in determining the "profits." \* The rental figure set by the Commission is thus arbitrarily and unreasonably high. *Cf. South Carolina Generating Co. v. FPC*, 249 F. 2d 755, 763-65 (4th Cir. 1957), *cert. denied*, 356 U.S. 912 (1958).

Moreover, the Commission has committed an even more fundamental error in including Hungry Horse benefits in its calculation of the annual charge for the Tribes. The payments required by Section 10(f) are intended to be full reimbursement by the licensee to others for the use of these waters to generate power. Payments for such benefits have been required by Congress from all licensees since 1920, and even from non-licensees since 1935, in order to achieve a closed and completely equitable system of allocating burdens and benefits. See House Rep. No. 1318, 74th Cong., 1st Sess. (1935), p. 25; Senate Rep. No. 621, 74th Cong., 1st Sess. (1935), p. 45. To increase the cost to consumers of electric power by requiring the Company to pay the Tribes for the use of this water made

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\* The details of the Commission's determination must be derived from the testimony of the Tribes' witness, Van Scoyoc, whose calculations the Commission accepted to the penny. The witness made it clear that he did *not* deduct the headwater benefits paid by the Company from the income attributed to the project. R. 596, 478, 481. His reason was that the Company might be paid offsetting benefits from companies downstream from Kerr, and hence both could be excluded. In fact, payments to the Company *were* included in the Company's revenues and allocated to the project. CT. Ex. 5, Sch. 6, Sheet 2, Col. 10, R. 1580; Sch. 4, Sheets 1-7, Line 40, R. 1565-1571; R. 459, 479.



available by the United States is at war with both the terms and the policy of the statute.\*

The Commission, while recognizing the problem, failed to meet it. The value of land, it said, may be increased by the construction near it of public structures, such as free-ways. Here, it said, the value of the Tribes' lands may be increased by the Hungry Horse reservoir. Opinion p. 27, R. 10086. That windfall increase in value, however, was precisely what Section 10(f) was intended to prevent. It does not lie in the mouth of the Commission, which must administer these annual charges to achieve an equitable reimbursement of the United States for the construction of Hungry Horse, to say now that a windfall in the form of "excess profits" from Hungry Horse has been conferred upon the Project. Nor, in view of Section 10(f), does it lie within the jurisdiction of the Commission to impose on Montana ratepayers a ten-year charge for the use of Hungry Horse that has nothing to do with the reimbursement of the United States for its construction.\*\*

*c. The Profitability Method of Calculating Annual "Value"  
Is in Any Event Legally Improper*

Regardless of defects in its application, however, we believe that it is legally improper to compute the annual payments by determining and sharing alleged "excess"

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\* The Examiner and the Commission's staff noted also that by reason of the Pacific Northwest Coordination Agreement of power producers, to which the Company is a party, benefits to the Company from Hungry Horse are derived as a benefit to the Company's system as a whole rather than as a benefit to Project No. 5 alone. Initial Decision p. 12, R. 9724; Staff Brief to Examiner pp. 33-34; see R. 381-83, 580-81.

\*\* The decision by this Court in the Third Unit case is not to the contrary. There, as a condition of the new license, rentals were set based on the marginal cost difference between achieving a given power output through the new project works and achieving the same output through an alternative. The "profitability" method was not used. This Court held that no question of paying the Tribes as well as the United States for the use of the United States storage facilities was raised, for the Commission was required to fix a rental charge if it was to authorize the construction of the unit on Indian lands under section 4(e) of the Act. Headwater benefits payments under 10(f) were dismissed as not involved. 112 App. D.C. at 12, 298 F.2d at 340.

profits. The Act and the license have explicitly provided for the treatment of possible excess profits from Project No. 5 in a way which excludes the Tribes from any share in them as such.

Since its enactment in 1920 Section 10(e) has provided for special charges "for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits." App. A, pp. 2a, 6a. The State of Montana made such provision in 1913 when it created the Montana Public Service Commission and gave it jurisdiction over the Company's rates. Section 10(d), in addition, requires that after 20 years of operation, excess earnings above a rate specified in the license (here, in Article 34, App. B, pp. 13a-14a) shall be placed in amortization reserves that may, as the Commission directs, be held until the end of the license, or applied to reduce the net investment and hence the recapture cost to the United States at the end of the license period. App. A, pp. 1a-2a, 6a. By deciding in this proceeding to transfer a portion of "excess profits" to the Tribes for at least ten years, the Commission has thus violated the comprehensive Congressional directives as to how such benefits from Company efficiency are to be allocated.\*

In essence, the Commission has refused to treat the use of Indian lands for power production as a fixed *cost* of doing business, as it was treated in the original license and in the Third Unit case, and as the courts have treated charges for the use of non-Indian lands in other cases. *FPC v. Niagara Mohawk*, 347 U.S. 239 (1954). Instead, the Commission has decreed that the Tribes be added to those many groups that are designated to share, in various proportions and at various times, in the income of this productive enterprise pursuant to the network of laws

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\* That the profitability method is a measure of the Company's earning power and efficient management and operation rather than the earning power of the Indian lands is not in doubt. See R. 544-547.

relating to it—the citizens of Montana and of the United States through State and Federal tax laws, the consumers of the Company's electric power through state public utility rate regulation legislation, the future citizens of the United States through the amortization provisions of the Act, and, finally, the shareholders of the corporation under state corporation and securities laws. Adding the Tribes to these profit-sharing groups is not within the competence of an administrative agency; only a legislature can establish and reconcile the standards of allocation. Here the Commission has, of course, not attempted to provide standards, or to estimate in legislative fashion what effects the decreed Indian profit-sharing will have upon the various channels through which the Company's income flows pursuant to other laws.\* Profit-sharing as a means of compensating the Tribes for the use of their lands should be rejected, as it was when the original license was negotiated (Scattergood Report p. 51, R. 8279), and as it was again by Secretary Ickes in 1934 (R. 6390).

There is also a second and related legal obstacle to the adoption of a profitability method—that in measuring excess profits the Commission goes through a rate-making proceeding, constructing a rate base and setting a rate of return, where the Act specifically denies it jurisdiction to do so.

Under the Act, state regulatory commissions have jurisdiction to fix consumer rates—and therefore a rate of return—on *intrastate* sales of a licensee's power. The Commission has jurisdiction to fix consumer rates and rates of return on *interstate* sales of power of licensees under certain circumstances. 16 U.S.C. §§ 812, 813, 824. Pursuant to these provisions, 97% of the Company's elec-

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\* Commissioner Carver, in his concurrence, questioned the Commission's authority to order profit-sharing without legislative guidance. R. 10093. On this and several other grounds he doubted the legality of the Commission's decision, but except for the jurisdictional question argued in Part I(B) above, on which he ultimately dissented, he felt that these were matters for the Court rather than the Commission to determine.

tric revenues are derived from rates regulated by the Montana Public Service Commission, and 3% by the Federal Power Commission. R. 555. The Montana Commission has determined the rate of return to the Company twice during the period at issue in this proceeding. On June 23, 1958, the Company's rates were increased to give it a rate of return of 5.33% (24 P.U.R. 3d 321, R. 502-03) and on July 28, 1964 the Company was ordered by the Montana Commission to pass on to consumers the benefits of the reduction in Federal income taxes. Its rate of return thereafter was determined to be 5.42%. (Unreported letter order).

Despite this, the Commission has arrived at its figure of \$950,000 as the annual charge by a purported finding of its own rate base and a rate of return thereon in excess of a "reasonable rate of return" (Opinion p. 19, R. 10078) of 6% (R. 499). Quite aside from the impropriety of conducting any rate-making proceeding through the testimony and cross-examination of a single witness for the Tribes, the Commission simply has no jurisdiction to decide upon a rate base and a rate of return for 97% of the revenue here involved. Yet that is what it has done. The Commission's profitability method requires it, as in a rate-making proceeding, to construct a rate base inconsistent with that used by the Montana Commission (*e.g.*, R. 461-62, 464-68, 503, 555, 602-03), and to fix a reasonable rate of return (R. 499-500); and to find that the rates, as set by the Montana Commission, provide an excessive rate of return. Only its order differs: it does not decree lower consumer rates, but preserves them at their purportedly unreasonable level by fixing a 10-year obligation to the Tribes which can be met without confiscation only by maintaining a level of income supplied by those rates. The effect is to oust the Montana Public Service Commission of its jurisdiction to construct a rate base according to its own rules, determine a reasonable rate of return, and

fix consumer rates accordingly. This the Federal Power Commission may not do.\*

**2. The Commission's Determination of the Tribes' Proper Share in the "Excess Profits."**

Having determined *de novo* the annual "value" of the Project, the Commission turned to the question of the Tribes' share thereof. This had been mooted in the Third Unit case and determined there to be 25%. There the Commission, with this Court's approval, reasoned that lands and capital investment are both necessary for power production, so that the annual "value" of the Project was attributed half to the lands and half to the investment; and, since the Tribes own only half the lands which the Project uses, their share, based on their contribution of lands, was one-half of one-half, or one-fourth.

There is no apparent reason why or how an increase in the "value" of the Project should increase the Tribes' proportional share of that value. The Commission, however, here chose to give the Tribes 42.13%, adopting the formula proposed by the Tribes' witness Sporseen. R. 171-72; Opinion pp. 24-25, R. 10083-84. Under this formula, the Commission calculated the Tribes' share according to their interest in the various *waters* that flow through the project turbines. Hungry Horse storage releases were viewed as accounting for 657 megawatt months, or 55% of the total; the project reservoir as accounting for 376 MW months, or 32% of the total; and the Flathead River, which flows through the reservoir, as accounting for 161 MW months, or 13%. The interest of the Tribes in these waters was then measured by the method used in the Third Unit case: since the Tribes own only half of the reservoir, they are deemed to have an interest in

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\* It may be noted in this connection that section 10(e) of the Act directs the Commission, in fixing charges (noted *supra* p. 46) "for the expropriation to the Government of excessive profits until the respective states shall make provision for preventing excessive profits . . .", to "seek to avoid increasing the price to the consumers of power by such charges."

one-half the reservoir flow, i.e., one-half of 32%, or 16%. Since the Tribes own the Flathead riverbed on which the dam is built, they are deemed also to have a claim to all the stream flow, or an additional 13%. Finally, they are deemed to have a claim to all of Hungry Horse-flow, an additional 55%. The total is 84%. But since investment and land are both necessary for power production, and the Tribes are contributing only land, the 84% figure is reduced by one-half, as in the Third Unit case, to produce the 42% share. R. 260, 275.

This, we submit, is simply an arbitrary way of increasing the Tribes' share above the 25% to which they were held entitled in 1962. It is playing with figures to reach a desired result. The notion of a *separate* stream flow, which the Tribes can claim in whole because the Kerr dam was built on the riverbed which they own, is a pure figment. R. 221-22. The stream flow ceased when the dam was built, and merged into the reservoir waters. Its separate contribution to the generating power of the actual Project, *with* its extra reservoir head, cannot be rationally determined (R. 229-33, 248-49, 269-74, 567-68); and in any case, considered alone it is an uneconomical source of power (R. 275-76; Scattergood Report p. 65, R. 8293).

Pretending that the stream still exists appears to be a way of expressing the fact that the dam happens to be built on the Indians' half of the lands in the Project, rather than on the Company's half. R. 171. But that fact is irrelevant. As Sporseen himself admitted (R. 274) the Project is designed and operated as an integral unit, and in appraising lands for such a project the same value is placed upon each acre notwithstanding that lands are used for different purposes within the project. R. 271. Each part of this Project is a *sine qua non*: The Company's half reservoir would be unproductive, to be sure, without the Indians' dam site; but the Indians' dam site would be uneconomical without the Company's half reservoir. This

interdependence was recognized in the original negotiations (Report, pp. 33-34, R. 8262-63) and in the Third Unit case, and the Commission's imaginary stream is no grounds for disregarding the sensible division of value which interdependence of assets requires.

But this specious attempt to separate the dam site—and the stream flow which once was there—from the rest of the Project affects only a few percentage points. Much more egregious is the treatment of Hungry Horse water. No reason whatever is given for crediting the Tribes with all of it. They cannot claim it, like the hypothetical stream flow, on some ground that it is associated with lands in which they have a full interest. If it flows over their wholly owned riverbed, it also flows through the Company's wholly owned half of the reservoir. R. 236. Moreover, the reservoir head and storage make possible the full utilization of Hungry Horse reflected in the generation at the Project, and it is the Company's system as a whole which, as the Examiner and the Staff recognized, makes possible the realization of much of the value of that generation through the Pacific Northwest Coordination Agreement with other power producers, *supra* p. 45 n., R. 252, 381-83, 580-81.\*

The Commission's reasons for abandoning the 25% share approved by this Court in the Third Unit case are without merit. The Commission says that the method of sharing used in the Third Unit case assigns half the value to the investment and half to the lands. So does the Sporseen method. R. 260, 275. The Commission says that a "net

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\* The only possible treatment of Hungry Horse contributions in a calculation that tries to refract land interests through water flows is to give the Tribes a claim to half on the basis of their ownership of half the lands in the project. This would lead to a tribal share consisting of 13% for the streamflow, 16% for one-half the reservoir flow, and 27.5% for one-half the Hungry Horse flow, for a total of 56.5%, which, halved as before, becomes a share of 28%. We have already noted, however, *supra*, p. 44, that in view of Section 10(f) of the Act, Hungry Horse benefits should not be involved in this proceeding at all—whether in calculating the value or in calculating the share.



benefits" method of calculating the value to be shared was used in the Third Unit case, whereas here "we are using Van Scoyoc's profitability method." To the extent that this comment has any relevance, it cuts against the Commission, rather than for it. What the Commission overlooks in applying this sharing formula to value calculated by the profitability method is that the additional advantage that accrues to both the Company's system and the Project from Hungry Horse releases has already been taken into account in calculating the "excess" profits of the Project, since the "earnings" of the Project have been calculated on a kilowatt hour, rather than an investment dollar, basis. Having thus given the Tribes this special advantage from Hungry Horse releases in its determination of value, the Commission cannot properly accord the Tribes total credit for the same releases in sharing that value.

We submit that this confused search for a new formula for determining the Tribes' share to attend the adoption of the profitability method is as unnecessary as it is arbitrary and unreasonable. Unless the proper sharing of the value of a thing remains the same, no matter how that value is derived, the concept of the "value" of a thing has no meaning. The Tribes' share here—if there is to be a *de novo* analysis of values—must remain at 25%, as it has always been in the past. The Commission's new share is arbitrary in itself, and in any event certainly cannot be justified either by, or in connection with, the Commission's adoption of the "profitability method" of determining annual value.

**C. In Any Event, the Commission Erred in "Readjusting" the Annual Payments for the "Third Unit."**

Project No. 5 was originally authorized, by the license issued in 1930, to have three generating units, but by an amendment in 1936 the authorization was reduced to two. On September 18, 1959, the construction and operation of a third unit were authorized by the Commission, which at

the same time ordered an additional annual rental to be paid by the Company to the Tribes. The amount of that annual rental, ultimately set at \$63,375, was finally approved by this Court in *Montana Power Co. v. FPC*, 112 App. D.C. 7, 298 F. 2d 325 (1962)—the Third Unit case.

In the present proceeding, the Commission has undertaken to "readjust" *that* annual rental, as well as the rental fixed in the original license. We submit that in doing so the Commission has acted without authority and in direct contravention of the decision of this Court in the Third Unit case.\*

In that proceeding the Company urged, both before the Commission and in this Court, that *no* additional rentals could lawfully be required for the third generating unit, since it was authorized by an amendment of the 1930 license, under which rentals had already been fixed for a 20-year period which had not yet expired. The Commission disagreed, and its argument was accepted by this Court. The Court said:

"[T]he additional authority, *although called an amendment*, was a *new and original license* for the third unit, within the meaning of Section 4(e) of the Act, and was subject to the requirements of Section 10(e) with respect to the use of the tribal lands. . . . The provisions of the license concerning the initial installations as to payments and other conditions cannot logically be said, it seems to us, to project into and become parts of a *new license* for different and additional project works." 112 App. D.C. at 11, 298 F. 2d at 339. (Emphasis supplied.)

Thus the Court held that the approval of the third unit was a "new license," for which, under Section 10(e) of the Act, a new, reasonable annual rental could be required.

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\* This is one of the several grounds on which Commissioner Carver in his concurrence expressed doubt about the legality of the Commission's decision. R. 10092. He described himself as "uncomfortable about reconciling the prior action on the Third Unit with today's action." R. 10093.

Notwithstanding that decision, the Commission now asserts that its approval of the third unit was *not* a new license, but simply an amendment of the 1930 license. Its opinion states:

"All three units are part of Project No. 5—all have been constructed pursuant to the license of May 23, 1930, as amended. . . . To assert that readjustments are applicable in separate years is to assert separate licenses, separate projects. There are separate project works but there are no separate licenses; there are no separate projects." R. 10063.

This attempt by the Commission to have it both ways cannot stand. That the third unit was *not* "constructed pursuant to the license of May 23, 1930, as amended," but rather was a "new and original license," is now *res judicata*. This Court's holding was a final judgment on the merits. The parties in the Third Unit case and in this case are the same. *De novo* litigation of the issue between the parties is thus precluded not only by general principle, but by the specific terms of the Power Act itself. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 339, 341 (1958). This was not a matter of administrative policy, upon which an expert agency might conceivably be permitted to take varying positions in successive considerations of the problem. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194 (1947). It involved instead a determination of past facts surrounding the issuance of the original license and a definitive construction of the statute in light of those specific facts. No change of circumstance is alleged—if, indeed, any would be relevant.\*

The Commission does not argue that the rentals set for a new license can be readjusted before 20 years. Indeed,

\* Other administrative agencies that have sought to make changes in a formula for calculating fixed money payments, despite final orders of reviewing courts affirming their prior determinations, have been held to lack jurisdiction to do so, if there is no statutory authority to modify. *International Mine Workers v. Eagle-Picher Co.*, 325 U.S. 335 (1945). The statute here specifically precludes any such authority.

it was because the rentals under the original license could not be readjusted before 1959, when 20 years expired, that a new license under 4(e) was necessary to start the 10(e) rental procedures afresh and permit the imposition of rental for the third unit in 1954. Since the third unit rentals arise out of "new and original" license issued as of 1954, they may not be readjusted until 1974. To the extent that the annual payment includes an additional amount for the third unit, therefore, it must be modified, and the Commission should be instructed to do so.

#### D. Further Considerations

Two other considerations militate against the determination by the Commission that \$950,000 is a proper annual rental for this Project.

1. Following the early intervention of the Secretary of the Interior into the proceedings before the Commission, the Commission's staff, the Examiner and the Commission were all from time to time warned by the Secretary that their efforts were doomed to futility if their decisions were not in substantial agreement with his position. *E.g.*, R. 53-56, Oral Argument R. 1561A-62A; Initial Decision p. 9, R. 9721. The Examiner, in an extraordinary commentary on the process of decision in this case, "concluded that the first step in resolving the problem before him was to select a reasonable figure as a readjusted annual charge after considering all the circumstances, and then, as a second step, to adopt an acceptable method to support the charge." Initial Decision p. 23, R. 9735. The Commission, which ultimately *increased* the charge recommended by the Examiner, revealed its apprehension about the possibility of a veto during the oral argument before it (R. 1565A-70A), during which an *ex parte* "dialogue between the Commission and the Secretary" was proposed. R. 1564A. Commissioner Carver suggested that the Commission's decision was designed, as in the Third Unit case, to meet the Secretary's demands and avoid his veto. Oral Argument, R. 1565A; Concurring Opinion pp. 3-4, R.

10091-92. The warning continues; the letter received by the Chairman of the Commission while the Company's petition for rehearing was pending recites that the Secretary would not veto the award "if it is retained in its present form." R. 10009.

However this Court may dispose of the issues raised in Point I, *supra*, this proceeding appears to have been tainted by the Secretary's continuing assertion of a veto power. When one party—and that a responsible executive department—consistently claims the right to overrule the judge if he is displeased with the outcome, a fair decision solely upon relevant evidence of record is impossible. *Cf. United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Certainly the appearance of fairness is missing, and that is enough. *In re Murchison*, 349 U.S. 133, 136 (1955); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966); *Pillsbury Co. v. FTC*, 354 F.2d 952, 963-65 (5th Cir. 1966); *Texaco, Inc. v. FTC*, 118 App. D.C. 366, 371-72, 336 F.2d 754, 759-60 (1964), *rev'd on other grounds*, 381 U.S. 739 (1965); *Amos Treat & Co. v. SEC*, 113 App. D.C. 100, 107, 306 F.2d 260, 267 (1962); *Trans World Airlines, Inc. v. CAB*, 102 App. D.C. 391, 392, 254 F.2d 90, 91 (1958).

2. The only way of judging the reasonableness and maintaining the legality of administrative determinations is by examining the reasoning upon which they are based. It is a basic tenet of administrative law that results that cannot be rationalized cannot stand. *Colorado Wyoming Gas Co. v. FPC*, *supra*, p. 42. But in this case, quite aside from the basic legal, logical, and factual flaws in the analysis that led to a figure of \$950,000 as the annual rental for these lands, it may be useful to note some comparisons. If the methods used in calculating the annual rentals to the Warm Springs Indian Tribes for the use of their lands in the Pelton (1955) and Round Butte (1961) projects had been used in this case, the annual rentals here would be \$253,830 rather than \$950,000. MP Co. Ex. 5, 6, R. 1660-61; Initial Decision p. 16, R. 9728. On the other

hand, had the profitability method used here been applied to determine the value of the Indian lands used in the Pelton and Round Butte projects, in both cases it would have been found that those lands had *no* value whatsoever (CT Revised Exhibit No. 9, R. 1606) although the Tribes actually received annual rentals of some \$330,000 from these projects. Company Reply Brief to Examiner pp. 22-23; R. 854; MP Co. Ex. 4, R. 1652. Moreover, in 1962 an annual rental of \$63,375 was approved as reasonable for the third generating unit at Project No. 5. There are two other generating units in the Project, of roughly equal size. Multiplying the third unit charge by three produces roughly \$190,000; refinements in calculating the combined value of the three units on the basis of the given value for the third can increase that result to \$248,102. R. 852-54, MP Co. Ex. 3, R. 1649-50. Yet the Commission today holds that the annual rental for the three should be \$950,000.

Discrepancies of this magnitude, when the calculations are long and complex, impose a particularly heavy burden on the Commission of demonstrating that the process by which it arrived at its result is coherent, compelling, and above all reasonable. *See Miss. River Fuel Corp. v. FPC, supra*, p. 43, 82 App. D.C. at 214, 163 F. 2d at 439. It is a burden which, we submit, its opinion does not meet.

### III

#### THE COMMISSION ERRED IN MAKING THE ANNUAL CHARGE EFFECTIVE AS OF MAY 20, 1959

Whatever may be the proper readjusted annual charge, there is no warrant for the order of the Commission making it payable retroactively to May 20, 1959, the end of the first 20 years of operation, and the date the petition for readjustment was filed by the Tribes. Retroactivity is expressly forbidden by the license, and even if it were not, the retroactivity decreed by the Commission is, under the circumstances, an abuse of its discretion.

1. The license is specific. Article 30(A)(3), after setting out a schedule of annual charges for various periods ending with the year 1954, then states that—

“Thereafter, until adjustment of the annual charges payable hereunder *shall have been effected* pursuant to the provisions of paragraph (D) of this Article 30 . . . \$175,000.” App. B, p. 11a.

This provision has not been amended. In 1961, as a result of the Commission’s decision in the Third Unit case, a subparagraph (4) was added, which provided that “in addition to the charges set forth above,” the licensee should pay an annual charge of \$63,375, “effective as of December 1, 1954.” App. B, p. 13a. See p. 62n. *infra*.

The new rates, therefore, are to be applied when an adjustment is “effected.” By no stretch of that language was an adjustment “effected” on May 20, 1959, at the end of 20 years of operations and when the Tribes’ petition was filed.\* Nor is there in this negotiated arrangement anything in conflict with the Act. Section 10(e), both in its original form and as amended in 1935, is permissive—“such charges *may* be readjusted at the end of twenty years.” Indeed, the Commission itself has recognized that under the Act retroactivity is not made mandatory. In discussing the possibility of yet another readjustment of the annual charge in 1969—at the end of another ten years—the Commission indicated that it might well make no further readjustment, pointing out that clearly “a prescribed charge will continue as the lawful charge under Section 10(e) until demonstrated to be inappropriate.” R. 10075.

The opinion of the Commission makes no finding that the existing annual charge of \$238,375 has been demonstrated to be inappropriate. It certainly can make no finding that

\* As this Court noted in the Third Unit case, the license required payment of the originally negotiated rentals “for the first twenty years *and until* the annual charges should have *thereafter* been adjusted in accordance with the terms of the license.” 112 App. D.C. at 8, 298 F.2d at 336. (Emphasis supplied).



in 1959 it was demonstrated to be inappropriate, or that it automatically became unlawful at that time. As this Court noted in *California Oregon Power Co. v. FPC*, *supra* p. 37, "the statutory obligations of section 10(e) are not self-executing." 99 App. D.C. at 270 n. 8. Instead, the Commission ignores completely the language of the license, and assumes that retroactivity is a matter wholly within its discretion. While even on that basis the Commission erred, as we show below, that is not the issue. The parties have made a contract, as they were authorized to do under the Act, providing the time when a readjusted rate of annual charges would replace that originally agreed upon. That agreement should be followed.

There are, in addition, further barriers to the retroactive change in the \$63,375 fixed as the annual charge for the third unit. We have already noted above (pp. 52-55) that since the 20-year period under the new third unit license does not expire until 1974, the Commission is without authority to modify the charge—retroactively or otherwise. In addition, however, there is the further fact that in 1961 the Commission found that \$63,375 was a reasonable annual charge for the third unit, and in 1962 this Court affirmed that decision. That litigation must be regarded as a final settlement of the appropriate annual charge attributable to that unit, at least for the years 1959-1962, which the Commission is bound to accept. *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932).

2. In any event, even if the Commission had discretion in the matter, the imposition of this greatly increased annual charge retroactive to May 1959 would be an abuse of that discretion and wholly unreasonable. From the point of view of the Company, its rates and revenues since 1959 have been fixed on the basis of the present annual charges. Contrary to the statement in the Commission's opinion (R. 10071) the Company could not possibly have justified the creation of a reserve, beginning in 1959, in anticipation of an increase of the magnitude contemplated here—and indeed not until the fact and the amount of the increase

were reasonably definite. This is especially true, as Commissioner Carver pointed out (R. 10093) where the back amounts are based on profit-sharing, which the Company had no reason to believe would be ordered. Thus the effect of the Commission's order on retroactivity will mean that the Company's future actions will be unfairly restricted by the burden of the rental charges for prior years, as well as the increased rental charges in the future.

The arguments of the Commission in justification of its decision (R. 10071) are singularly inappropriate in the present circumstances. It states that a failure to order retroactivity would encourage delay—but here it was through no fault of the Company, and entirely the responsibility of the Commission, that six years elapsed from the filing of the petition for readjustment by the Tribes to the date of the hearing. It states that without retroactivity the decision would be unfair to the Tribes—but there was no rule of law or practice that required the Tribes to wait until 1959 to initiate a proceeding for readjustment. Nor was the Company required or permitted to readjust unilaterally in 1959. *California Oregon Power Co. v. FPC*, *supra* p. 37. Rental readjustment is not like rate-setting, where a Company may be found to have erred in its responsibility to maintain reasonable rates at all times. And it states that a proceeding might occur in which its determination would be delayed until after the lease had terminated, in which only a retroactive award would result in any readjustment at all—but when that set of circumstances arises, if ever, it can be dealt with on its-own merits.

Had the Commission decreed that the readjustment should date from the decision of its Examiner, in 1966, we would think it within the proper levels of discretion. At that point the Company, being advised of the possibility of a major increase in the annual charges, could have taken appropriate steps to protect itself, and to insure that the burden of the increase would fall fairly. The Commission having failed to so order, its decision granting full retroactivity should be reversed.

## IV

**THE COMMISSION ERRED IN HOLDING THAT INTEREST WAS  
DUE ON THE RETROACTIVE CHARGES, AND IN ANY EVENT  
IN FIXING THE RATE OF INTEREST AT 6 PERCENT**

In the event the Court should sustain, in whole or in part, the retroactive payments required of the Company, we submit that the Commission's order with respect to interest is in error. First, we believe that no interest whatever is due under the circumstances of this case. Second, we believe that if any interest is proper, the rate should not exceed the 4 percent ordered by the Commission and approved by this Court in the Third Unit case.

1. The general common law and statutory rule denies interest on an unliquidated claim because of the inequity in charging a debtor for the use of an unknown sum which he could not have repaid if he would. This has been the rule of the Federal courts (*e.g.*, *Southern Painting Co. of Tenn. v. United States*, 222 F. 2d 431 (10th Cir. 1955), and *American Surety Co. v. Cove Irrig. Dist.*, 54 F. 2d 197, 199 (9th Cir. 1931)); and of the courts of Montana (*e.g.*, *W. J. Lake & Co. v. Montana Horse Products Co.*, 109 Mont. 434, 441, 97 P. 2d 590, 594 (1940)). The rule applies equally in cases involving an unliquidated claim for rentals. *Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. 354 (1893). The claim here was certainly an unliquidated one, at least until the decision of the Commission.

Some courts in action for tort and breach of contract have not applied this rule, reasoning that the damage caused by the wrongdoer includes not only the initial injury but also the loss sustained by reason of delayed compensation. *Miller v. Robertson*, 266 U.S. 243, 258 (1924). That exception has no application here. The readjustment has occurred pursuant to and within the framework of the license; in no sense are the adjusted annual payments compensation for a breach of the license. If the license does not bar retroactivity by providing that the original charges

shall prevail "until adjustment . . . shall have been effected" (*supra* pp. 57-58), at the very least that language authorizes the Company to continue the payment of the original rentals without becoming liable for interest by reason of a later readjustment. Cf. *Board of Comm'rs v. United States*, 308 U.S. 343, 352-53 (1939); *Swift & Co. v. United States*, 257 F. 2d 787, 796 (4th Cir.), *cert. denied*, 358 U.S. 837 (1958).

Nor does this case fall within the further exception sometimes made to the rule against interest on unliquidated damages—when the obligor's bad faith has caused the delay in ascertaining the amount due. The Commission has made no finding of bad faith, nor could it on this record. It was the Commission itself, not the Company, which elected to postpone this proceeding pending the final decision in the Third Unit proceeding, and to wait several years thereafter before scheduling this proceeding for hearing.

2. However, even if this were a proper case for assessing interest against the Company, the 6 percent rate set by the Commission is arbitrary and excessive. Congress has provided that rentals for the use of the lands in question "shall be deposited in the Treasury of the United States to the credit of said Indians, and shall draw interest at the rate of 4 per centum." 45 Stat. 200, 213 (1928). Since the Indians lost only that 4 percent by the delay, it is unreasonable to compensate them for the delay at a higher rate.\*

In the light of the statute, it is difficult to understand the Commission's statement that interest at 4 percent would "unjustly enrich Montana Power at the expense of the

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\* In the Third Unit case, in which interest at 4% was imposed on rental payments for the years between installation and the Commission's order, the Company had been authorized to install the unit in 1954 at its own risk pending licensing and determination of rentals.

Tribes" (p. 13, R. 10072).<sup>\*</sup> The Company did not unjustly cause the delay. Moreover, interest on the unliquidated obligation must be to compensate the Indians, not to penalize the Company, which committed no wrong by continuing payments at the original rates until the new amount due was ascertained. Cf. *Bergen County Sewer Authority v. Little Ferry*, 15 N.J. Super. 43, 83 A. 2d 4 (App. Div. 1951).

The reference by the Commission (R. 10072) to its decision in *Wisconsin and Michigan Power Co.*, 31 F.P.C. 1445 (1964) as authority for a 6 percent rate is wide of the mark. That decision accords 6 percent interest on rate refunds. Since the rate was held unlawful, the company collecting it was a wrongdoer. Interest to prevent unjust enrichment of one who has acted illegally is wholly different from interest on a readjusted annual rental, where no illegal or unlawful act can be charged, and where a statute fixes the measure of what the Tribes would have received had the payments been made correctly. The statutory measure of the Indians' loss was presumably the basis for the decision of the Commission awarding interest at 4 percent in the Third Unit case. See p. 62 n., *supra*. If any interest at all is due, the rate approved in that case should be applied.

### CONCLUSION

Wherefore, the Court should remand this cause to the Commission with instructions to enter into negotiations with the Company and the Secretary of the Interior as to an appropriate readjusted rental, and if such negotiations are unsuccessful, to submit the matter to arbitration. Were

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<sup>\*</sup> It may be appropriate to note that the Company was not "enriched" by 6 percent by reason of having had the use of the amounts since 1959. Had it not had the use of these amounts and had it undertaken to secure equal amounts by borrowing, it would have paid far less than 6 percent. The prime interest rates from 1959 to 1967 ranged from 4½ to 6 percent, averaging about 4.8 percent. Federal Reserve Bulletin, Dec. 1960, p. 1367; Sept. 1967, p. 1208.

the Court to conclude that the Commission had jurisdiction, its decision and order should be set aside for the reasons above stated.

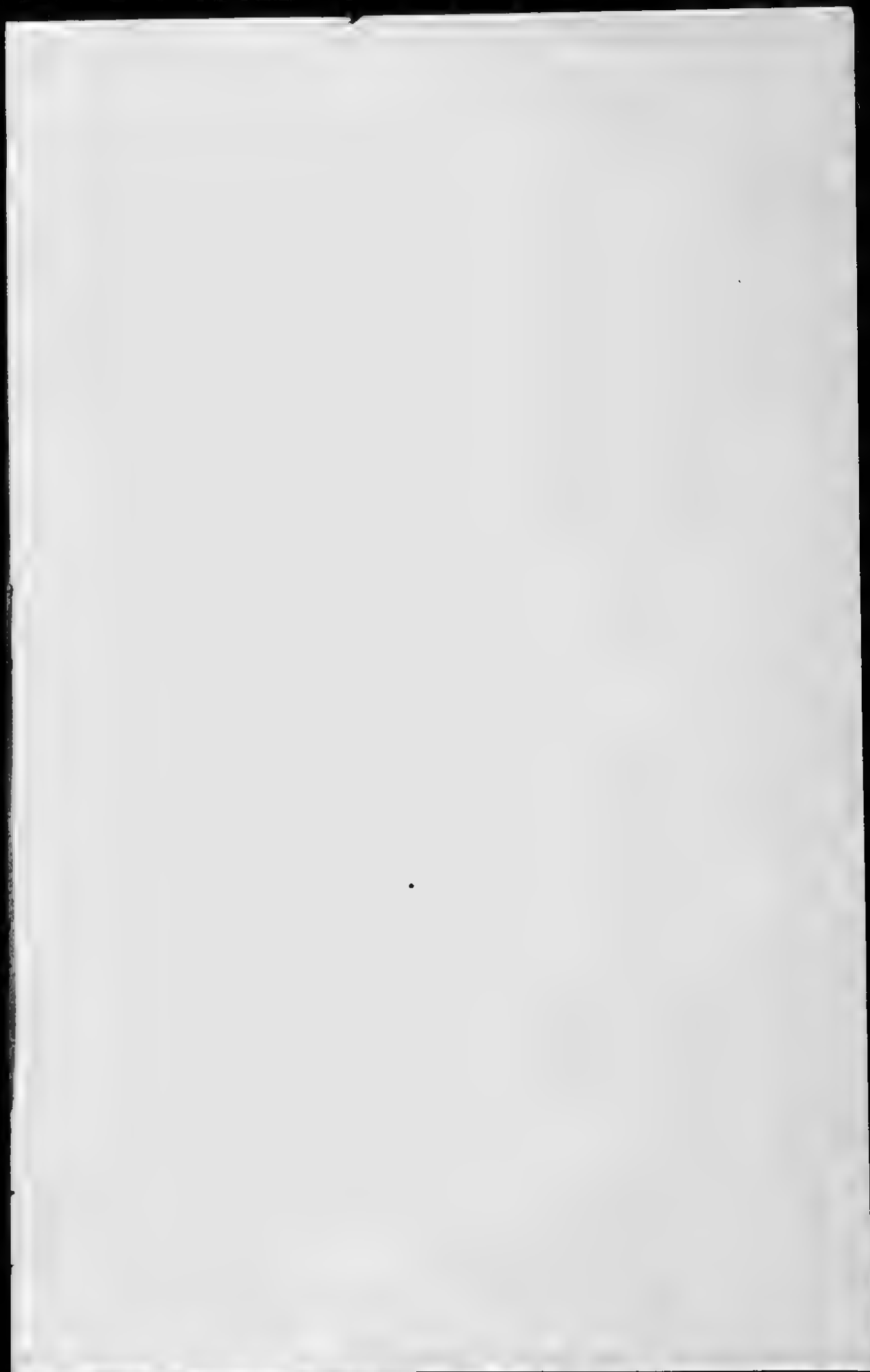
Respectfully submitted,

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July 15, 1968





## **APPENDIX**



**APPENDIX A**

**General Dam Act of 1906, ch. 3508, § 7, Act of June 21, 1906, 34 Stat. 387, and General Dam Act of 1910, Act of June 23, 1910, ch. 380, § 7, 36 Stat. 596:**

That the right to alter, amend, or repeat this Act is hereby expressly reserved as to any and all dams which may be constructed in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any dam which shall have been constructed in accordance with its provisions.

• • •

**Federal Water Power Act of 1920, Act of June 10, 1920, ch. 285, 41 Stat. 1053:**

SEC. 6. That licenses under this Act shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the commission after ninety days' public notice.

• • •

SEC. 10. That all licenses issued under this Act shall be on the following conditions:

• • •

(d) That after the first twenty years of operation out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of a licensee in any project or projects under license the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the commission, be held until the termination of the license or be applied from time to time in reduction of the

net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license: *Provided*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower capacity

may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the commission.

(f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the commission.

Whenever such reservoir or other improvement is constructed by the United States the commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

• • •

SEC. 28. That the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

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Federal Power Act of 1935, Act of August 28, 1935, ch. 687, 49 Stat. 838,  
as amended, 16 U.S.C. § 791 et seq.:

SEC. 4 [16 U.S.C. § 797] The commission is authorized and empowered—

\* \* \*

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the

use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

•   •   •

SEC. 6 [16 U.S.C. § 799]. Licenses under section 792, 793, 795-818, and 820-823 of this title shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of sections 792, 793, 795-818, and 820-823 of this title and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of Title 41.

•   •   •

SEC. 10 [16 U.S.C. § 803]. All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:

•   •   •



(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of sections 792, 793, 795-818, and 820-823 of this title; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project

is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

• • •

SEC. 28 [16 U.S.C. § 822]. The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter, or the rights of any licensee thereunder.

• • •

SEC. 313(b) [16 U.S.C. § 825(l)(b)]. Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission

shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

## APPENDIX B

## Kerr Project No. 5 Licenses\*

*Article 30.* (a) The Licensee shall pay into the United States Treasury, as compensation for the use in connection with this license, of the Flathead Indian tribal lands, annual charges, computed as follows: During the period from May 23, 1930 to January 1, 1955, and in accordance with the following modified schedule of annual charges, the Licensee shall pay as charges the sum due under the license as originally executed, to-wit, \$2,929,000, together with interest at the rate of 4 per cent per annum on all payments deferred under this modified schedule, such interest amounting to an additional \$168,800, which sum shall be paid in annual installments as it accrues consistently with the following schedule of interest payments:

## Schedule of Interest Payments

Year	Interest	Year	Interest
1934	\$ 1,120	1945	\$ 11,600
1935	3,040	1946	10,000
1936	4,960	1947	8,400
1937	7,480	1948	6,800
1938	11,000	1949	5,200
1939	14,400	1950	4,200
1940	16,000	1951	3,200
1941	16,000	1952	2,200
1942	14,800	1953	1,200
1943	13,600	1954	1,200
1944	12,400		
		Total	\$168,800

It is agreed that should the said Licensee pay the whole or any part of the deferred charges in advance of the due date provided for under the amended schedule herein, interest shall be paid only insofar as it actually has accrued. [Subarticle (a) was added by license amendment dated July 17, 1936.]

\* R. 8854 et seq.

## Schedule of Annual Charges

(1) A charge at the rate of \$1,000 per calendar month beginning with the month in which the license was issued and extending to and including the month of May, 1939.

(2) A charge at the rate of \$5,000 per month beginning with the calendar month of June, 1939, and extending to the end of the calendar year 1939.

(3) For each full calendar year from and after the first of January, 1940, annual charges will be as follows:

	<u>Per Year</u>
For the year 1940 .....	\$110,000
For the year 1941 .....	150,000
For the years 1942 to 1945, inclusive ....	180,000
For the years 1946 to 1953, inclusive ....	200,000
For the year 1954 .....	205,000
Thereafter, until adjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of paragraph (D) of this Article 30 .....	175,000

[The language of (1), (2) and (3) above was included in the license amendment of July 17, 1936. The original license read as follows:

Article 30. (a) The Licensee shall pay into the United States Treasury as compensation for the use, in connection with this license, of the Flathead Indian tribal lands annual charges computed as follows:

(1) A charge at the rate of One Thousand Dollars (\$1,000) per calendar month beginning with the month in which the license is issued and extending to and including the month in which the project is placed in commercial operation. For the purpose of the payments under this article, the beginning of commercial operation shall be considered as the time when one of the Licensee's generating units shall have been installed, tested, and demonstrated to be in suitable

condition to produce electric energy for commercial purposes with a reasonable degree of reliability.

(2) A charge at the rate of Five Thousand Dollars (\$5,000) per month beginning with the calendar month next succeeding the date on which the project is placed in commercial operation and extending to the end of the calendar year in which such commercial operation shall commence.

(3) For each full calendar year from and after the 1st of January next following the date on which the first unit is placed in commercial operation, annual charges will be as follows:

	Per Year
For the first two years .....	\$ 60,000
For the third year .....	75,000
For the fourth year .....	100,000
For the fifth year .....	125,000
For the next five years .....	150,000
For the next five years .....	160,000
For the next five years and/or until re-adjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of paragraph (D) of this Article 30	175,000]

Subject to the provisions of the Federal Power Act, the Licensee shall also pay to the United States for the purpose of compensating the Confederated Salish and Kootenai Indian tribes for the use of Flathead Indian tribal lands for transmission line purposes only, \$198.97 for the period from March 25, 1937, through December 31, 1942; \$35.16 for each calendar year from January 1, 1943, through December 31, 1945; and \$50.86 for each calendar year thereafter.

[The above paragraph was added by license amendment dated November 28, 1945, and was amended to its present form by license amendment dated September 11, 1947.]



(4) In addition to the charges set forth above, the Licensee shall pay into the United States Treasury, as compensation for the use in connection with this license of the Flathead Indian lands by the third Kerr generating unit, an annual charge of \$63,375, effective as of December 1, 1954. The additional annual charges from December 1, 1954 through December 31, 1958, shall be paid within 31 days after this order becomes final, together with simple interest thereon at the rate of 4 percent per annum, beginning as follows:

Period of Annual Charge	Amount of Annual Charge	Beginning of Interest Period
Dec. 1954	\$ 5,281.25	Feb. 1, 1955
Year 1955	63,375.00	Feb. 1, 1956
Year 1956	63,375.00	Feb. 1, 1957
Year 1957	63,375.00	Feb. 1, 1958
Year 1958	63,375.00	Feb. 1, 1959

[Subsection (4) was added by license amendment dated January 30, 1961.]

(b) Payments shall be made for each calendar year within 30 days after the close thereof on bills rendered by the Commission.

(c) Pursuant to the provisions of the act of March 4, 1929 (45 Stat., 1640), all charges for reimbursing the United States for the cost of administration of the Federal Water Power Act have been and are hereby expressly waived.

(d) The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operation under this license and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission, and the Secretary of the Interior cannot agree upon the readjustment of such charges,

it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in "The United States Arbitration Act," (U.S.C. Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to-wit: upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development.

• • •

*Article 33.* Whenever the Licensee is directly benefitted by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of such reservoir or other improvement for such part of the annual charges for interest, maintenance and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by the Licensee shall be determined from time to time by the Commission. Whenever such reservoir or other improvement is constructed by the United States, the Licensee shall pay similar charges into the Treasury of the United States upon bills rendered by the Commission.

*Article 34.* After the first twenty years of operation of said project under this license, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of the Licensee in said project, all as defined in and determined by the provisions of regulation 17 of said rules and regulations of the Commission, the Licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return shall, subject to the proviso of paragraph A, section 3 of said regulation, be one and one-half ( $1\frac{1}{2}$ ) times the weighted average annual interest rate payable on the

par value of the bona fide interest-bearing debt of the Licensee actually outstanding, in whole or in part, on account of project property at the beginning of the period of amortization and of each calendar year thereafter; such weighed average annual interest rate being determined as provided in paragraphs B and C of Section 3 of said regulation 17: Provided, That, if at the beginning of the period of amortization or of any calendar year thereafter, the outstanding interest-bearing debt of the Licensee on account of the project or projects under license, together with any other works or property operated in connection therewith, is less than 25 per cent of the actual, legitimate investment of the Licensee in said project or projects, then and in such event for the calendar year next following the specified rate of return shall be two (2) times the legal rate of interest in the State in which the project or major part thereof is located.

Subject to the provisions of Section 6 of said regulation, the following proportions of such surplus earnings shall be paid into and held in such amortization reserves: Of all surplus earnings up to and including 2 per cent upon the actual, legitimate investment, 30 per cent thereof shall be so paid; of all surplus earnings in excess of 2 per cent and not in excess of 4 per cent upon such investment, 50 per cent thereof shall be so paid; of all surplus earnings in excess of 4 per cent and not in excess of 6 per cent, 70 per cent thereof shall be so paid, and of all surplus earnings in excess of 6 per cent, 90 per cent thereof shall be so paid: Provided, That if at the end of any calendar year of the amortization period the Commission shall find that the accumulated earnings of the Licensee during the period of operation, including the first twenty (20) years thereof, have not yielded a fair return upon the actual, legitimate investment in the project or projects under license, the proportion of such surplus earnings for such calendar year and for succeeding calendar years to be paid into such

amortization reserves shall be ten (10) per cent thereof until such time as the accumulated earnings of the Licensee represent, in the judgment of the Commission, a fair return upon such investment for such period of operation.

\* \* \*

*Article 41.* With the written consent of the Licensee, the Commission may by order made under its seal, and after the public notice required by Section 6 of the Act, modify, alter, enlarge or omit, insofar as authorized by law, any one or more of the conditions or provisions of this license; provided, however, that any such change in the terms of this license that may affect the interests of the Flathead Indians shall also be subject to approval by the Secretary of the Interior.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION

No. 1251

THE MONTANA POWER COMPANY, a Montana Corporation,  
*Petitioner,*

v.

THE FEDERAL POWER COMMISSION, JOSEPH C. SWIDLER, Chair-  
man, DAVID S. BLACK, Vice Chairman, CHARLES R. ROSS,  
LAWRENCE J. O'CONNOR, JR., CARL E. BAGGE, Members  
of the Federal Power Commission, and STEWART L.  
UDALL, Secretary of Interior, *Respondents.*

Order

By this action petitioner seeks to compel compliance with the terms of an arbitration provision contained in a license issued to it by the respondent Federal Power Commission covering the construction and operation of its Kerr Hydroelectric project on the Flathead River in Montana. Petitioner also seeks the appointment by this court of an arbitrator and the stay of proceedings presently pending before the Federal Power Commission and set for hearing on July 20, 1965. The petition alleges that jurisdiction of the action is conferred on this court by 28 U.S.C.A., § 1331, relating to Federal questions and 9 U.S.C.A., § 1 et seq., the United States Arbitration Act.

Respondents Federal Power Commission and its members, and the Secretary of the Interior have filed separate motions to dismiss, on the ground, among others, that this court is without jurisdiction of this action. Since this ground of the motions to dismiss is dispositive of the case, the other grounds for the motions will not be considered.

The Kerr project of the petitioner is constructed in part on lands belonging to the Confederated Salish and Kootenai

Tribes of the Flathead Indian Reservation of Montana. The license issued to petitioner by the Federal Power Commission fixed annual charges to be paid by petitioner for the occupancy of the Indian land and provided that at the end of 20 years after the beginning of operation under the license, and at periods of not less than 10 years thereafter, the annual charges would be readjusted "by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior". Article 30(D) of the license further provided, in part, that:

"In case the Licensee, the Commission and the Secretary of the Interior cannot agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in 'The United States Arbitration Act' (U.S.C., Title 9) . . . ."

The petitioner alleges in substance that the original 20 year term having expired, it attempted in good faith to negotiate the readjustment of the annual charges with the Secretary of the Interior and the Federal Power Commission, but that each of the latter had refused to negotiate and the Federal Power Commission has instead issued an order fixing the matter for hearing before the Commission. It is compliance with the above quoted provisions of Article 30(D) which petitioner seeks in this action.

The petitioner attached to its petition a copy of the Power Commission's order of March 29, 1965, setting the meeting for hearing July 20, 1965. From the Commission's order it appears that the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation had filed a petition with the Federal Power Commission seeking readjustment of the annual charges under the license. It further appears from the Commission's order that a dispute has arisen between the petitioner and the Indians as to whether or not readjustment of the annual charges is necessary at this time and as to whether, in the event readjustment is necessary, Sec-

tion 10(c) as amended of the Federal Power Act, or Article 30(D) of the license should apply in making such readjustment. The Commission therefore set the matter for hearing to determine (1) Whether readjustment is necessary; (2) If so, what the readjustment should be; and (3) Whether any such readjustment should be ordered by the Commission pursuant to the provisions of Section 10(e) as amended of the Act.

At the time of the issuance of the license in question Section 10(e) of the Federal Power Act provided in substance that readjustment of annual charges should be made "in a manner to be described in each license". Pursuant to that provision of the Act, the license issued to petitioner provided that the readjustment of charges should be made in the manner above described. Subsequent to the issuance of the license in question to petitioner, and in 1935, Section 10(e) of the Federal Power Act was amended to provide that the annual charges "be readjusted by the Commission . . . upon notice and opportunity for hearing".

Section 28 of the Federal Power Act provides in effect that any amendment or alteration of the Act shall not affect any license theretofore issued under the provisions of the Act or the rights of any licensee thereunder, and petitioner insists that in view of this provision of Section 28, amended Section 10(e) cannot be applied to the readjustment of charges under its preexisting license and that such readjustment of the annual charges must be made either through mutual agreement or arbitration as provided in Article 30(D) of the license, rather than by the Commission under amended Section 10(e).

From the material that is before the court, it would appear that petitioner's argument that Article 30(D) of the license should control the readjustment of the annual charges rather than Section 10(e) of the Act, as amended, is sound. However, regardless of the merits of that argument, it also clearly appears from the record before the



court that that very issue is presently pending in a proceeding before the Federal Power Commission. Section 313 of the Federal Power Act (16 U.S.C.A., § 825(1) provides the procedure for rehearings of Federal Power Commission orders and court review of such orders. In substance, Section 313 provides that any person aggrieved by an order issued by the Commission may apply for a rehearing within 30 days after the issuance of such order and that failing to obtain redress on the petition for rehearing the aggrieved party may obtain a review of the Commission's order in the United States Court of Appeals for any Circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia. The section further provides that the judgment of the Court of Appeals affirming, modifying or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari.

In *City of Tacoma v. Taxpayers of Tacoma, et al.*, 357 U.S. 320, the Supreme Court considered the effect of Section 313 of the Federal Power Act. It stated, concerning the section, at 335 and 336 as follows:

"This statute is written in simple words of plain meaning and leaves no room to doubt the congressional purpose and intent. It can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. (Citing case). *So acting, Congress in § 313 (b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders.* (Citing case). It there provided that any party aggrieved by the Commission's order may have judicial review, upon all issues raised before the Commission in the motion for rehearing, by the Court of Appeals which 'shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in

part,' and that '(t)he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, *shall be final*, subject to review by the Supreme Court of the United States upon certiorari or certification . . .' (Emphasis added.) *It thereby necessarily precluded do novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review."*

See also *Indiana & Michigan Electric Co. v. Federal Power Commission*, 224 Fed. Supp. 166, (1963) and cases therein cited.

From the foregoing, it is seen that in the present action the petitioner seeks to litigate in this court an issue which is inherent in the controversy presently pending before the Federal Power Commission. It is clear that the exclusive jurisdiction to determine that issue lies with the Federal Power Commission and the Court of Appeals under Section 313 (b) of the Act, and that this court is without jurisdiction to decide such issue.

If petitioner is correct in its contention that Article 30(D) of the license controls in the readjustment of the annual charges, it must be assumed that the Federal Power Commission will so decide, but in the event the Federal Power Commission reaches an incorrect conclusion on the issue, it must be further assumed that a Court of Appeals will rectify the Commission's error. Once it has been decided in the only tribunal having jurisdiction to make such decision that Article 30(D) of the license controls the matter of readjustment, in the event that petitioner, the Commission and the Secretary of Interior fail to agree on the readjustment of the annual charges, then and only then would this court have jurisdiction to proceed under the United States Arbitration Act to appoint an arbitrator.

For the foregoing reasons, **IT IS ORDERED** and this does order that the motions of the respondents to dismiss be and the same are hereby granted and said action is hereby dis-

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missed upon the ground that this court is without jurisdiction to entertain the same.

Done and dated this 24th day of May, 1965.

W. D. MURRAY

W. D. Murray

*United States District Judge.*



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**BRIEF FOR RESPONDENT  
FEDERAL POWER COMMISSION**

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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21904

THE MONTANA POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE  
FLATHEAD RESERVATION, MONTANA; SECRETARY OF THE  
INTERIOR, STEWART L. UDALL, INTERVENORS

---

No. 21767

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE  
FLATHEAD RESERVATION, MONTANA, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

THE MONTANA POWER COMPANY, INTERVENOR

---

On Petitions to Review an Order of the  
Federal Power Commission

---

RICHARD A. SOLOMON,

General Counsel,

United States Court of Appeals

for the

with PETER H. SCHIFF,

Solicitor,

FILED SEP 24 1968

DREXEL D. JOURNEY,

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Federal Power Commission,  
Washington, D. C. 20426.

September 1968

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Nathan J. Paulson  
CLERK



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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 21904

THE MONTANA POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE  
FLATHEAD RESERVATION, MONTANA; SECRETARY OF THE  
INTERIOR, STEWART L. UDALL, INTERVENORS

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No. 21767

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE  
FLATHEAD RESERVATION, MONTANA, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

THE MONTANA POWER COMPANY, INTERVENOR

---

On Petitions to Review an Order of the  
Federal Power Commission

---

BRIEF FOR THE FEDERAL POWER COMMISSION

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## STATEMENT OF THE ISSUES PRESENTED

1. Whether Section 10(e) of the Federal Power Act, as amended in 1935, requires the Commission to make the determination as to the readjustment of annual charges for the use of Indian lands under all licenses where such charges are imposed.

2. Whether the Commission's readjustment of annual rental charges the licensee is required to pay for the use of the Indian Tribal lands by its Kerr hydroelectric project was reasonable and legally consistent with the requirements of the Federal Power Act and the license issued to the Montana Power Company.

3. Whether the Commission reasonably required the readjusted charges to become effective as of May 20, 1959.

4. Whether the Commission reasonably exercised its discretion in requiring six percent interest to be paid on the excess of readjusted charges over current charges.

This case has not previously been before this Court.

## COUNTERSTATEMENT OF THE CASE

Petitioners challenge the Commission's order of October 4, 1967, (Opinion 529) readjusting annual charges for use of Indian lands (R. 10057). Rehearing was denied on March 21, 1968 (R. 10157).

The Commission proceeding was initiated pursuant to a petition of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (the "Tribes") filed with the Commission on May 19, 1959. It requested readjustment of the annual charges paid by petitioner, The Montana Power Company (Montana),<sup>1</sup> for Montana's use of tribal lands in connection with its operation of the Kerr hydroelectric project (Project No. 5) (R. 9363-9366). The license for this project, issued by the Com-

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<sup>1</sup> The Tribes are intervenors in No. 21904 and independently seek review of the Commission's decision in No. 21767 in which Montana intervened. Both proceedings in this Court were consolidated by order issued on June 10, 1968.

mission in 1930, provides that the readjustment of charges, permitted by the statute at the end of 20 years of service under the license, shall be based on the commercial value of the tribal lands involved for the most profitable purpose for which suitable, including power development (R. 8879). The Secretary of Interior ("Secretary"), as trustee for the Tribes, 25 U.S.C. 2, intervened and participated in the proceedings before the Commission.

*Background of proceedings.*—The Kerr facilities, built and operated pursuant to license issued by the Commission consist of a concrete arch dam 381 feet long, 200 feet high with a 179 foot radius at the top, and a powerhouse containing three units (two of 77,000 horsepower and a third of 78,500 horsepower) each driving a 56,000 kw generator (R. 63). The dam and powerhouse are located at the southern side of Flathead Lake on land owned by the Tribes who also own the lands underlying approximately the southern half of the Lake (R. 63). Flathead Lake provides storage capacity of 1,217,000 acre feet (R. 63). Additional regulation of stream flow is provided by the Hungry Horse reservoir, located about 50 miles upstream from Flathead Lake, which is owned by the federal government and which has storage capacity of 3,166,000 acre feet (R. 64).

The first generating unit at Kerr was completed in 1938 (7 FPC 528, 530) more than eight years after the original license was issued.<sup>2</sup> The original license dated May 23, 1930 was issued to Rocky Mountain Power Company ("Rocky Mountain"), a wholly-owned subsidiary of Montana, and authorized Rocky Mountain to commence within one year, and to complete within three years, construction of three generating units aggregating not less than 150,000 horsepower. The license also fixed the amounts of

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<sup>2</sup> The original license was issued when the Commission was composed of the Secretary of Interior, the Secretary of War and the Secretary of Agriculture (41 Stat. 1063). The Commission was reconstituted as an independent agency with five Commissioners in 1930, soon after the license was issued (46 Stat. 797).

annual rental payments to be made for the use of the Tribal lands. Rocky Mountain failed to complete construction within the period provided in the license and on February 16, 1935 applied for an extension of time to May, 1938 to complete construction. This motion was denied by the Commission on April 1, 1935<sup>3</sup> (R. 8871, 9044).

However, on July 17, 1936, an amendment to the 1930 license was issued by the Federal Power Commission authorizing the construction of two generating units having a total generating capacity of 150,000 hp, and providing a new schedule of payments for the use of the Tribal lands, approved by the licensee, the Tribes and the Secretary (R. 9047, 9048, 9051-9052).

Montana which had meanwhile succeeded to the license completed the second unit on May 31, 1949. A third unit, which was built without the requisite licensing authorization, was completed and placed into operation on December 5, 1954 (R. 64). The Commission, after proceedings to determine, *inter alia*, whether additional charges should be made for the use of the Tribal lands, amended the Kerr license *nunc pro tunc*, in 1961, and required that annual payments of \$63,375 be made by Montana for the additional use of the Tribal lands from 1954.<sup>4</sup>

After initiation of the pending proceeding by order issued on March 29, 1965 (R. 9425, 33 FPC 647), Montana instituted suit in the District Court of the United States for the District of Montana to stay the Commission's proceedings on the ground that any readjustment of the annual charges for use of Tribal lands was governed by provisions in Article 30(D) of the original license

<sup>3</sup> The matter was referred to the Attorney General of the United States pursuant to Section 13 of the Act for proceedings to revoke the license. It does not appear that formal action in this regard was taken.

<sup>4</sup> The Commission by order of September 18, 1959 fixed the rental charge at \$50,000 (22 FPC 502) but on rehearing determined that a \$63,375 annual payment was reasonable. 25 FPC 221. This Court affirmed the Commission's action. *Montana Power Co. v. F.P.C.*, 112 AppDC 7, 298 F. 2d 335 (1962).



stating that in case the licensee, the Commission and the Secretary of the Interior could not agree upon readjusted charges, the matter should be submitted to arbitration "in the manner provided for in the United States arbitration act" (R. 8861). The action was dismissed<sup>5</sup> as premature on the ground that the tribunal having primary jurisdiction to decide the applicability of Article 30(D) is the Commission whose decision is subject to review by a Court of Appeals.

*Examiner's decision.*—After a pretrial conference in June 1965, extensive evidence was presented by the parties<sup>6</sup> at hearings starting October 28, 1965 and concluding November 10, 1965. After consideration of the testimony and exhibits, briefs filed by all the parties and an oral argument, the examiner on August 4, 1966, issued his initial decision (R. 9712-9735). He concluded first that the Commission had jurisdiction to readjust the charges, because the arbitration provision in the license provided only for a procedural process for readjustment which was superseded by the 1935 amendment to Section 10(e) (R. 9718-9719). He also held that the readjustment should be based on the commercial value of the entire project, including the third unit for which separate annual charges had been provided when it was separately licensed (R. 9722-9723). These readjusted charges, he concluded, should be made effective as of May 1, 1959, which he found to be 20 years after the start of commercial operations (R. 9720-9722). He determined that in lieu of the present annual payments to the Tribes of \$238,375 there should be an annual charge of \$850,000, with interest thereon from May 1, 1959 at the rate of 4 percent per annum (R. 9735). His decision discussed the proposals of witnesses for all the parties in considerable detail (R. 9724-9734). In reaching this result, the ex-

<sup>5</sup> *Montana Power Co. v. F.P.C.*, No. 1251 (DC Mont., May 24, 1965). See Appendix C of Montana's brief for a copy of the court's order.

<sup>6</sup> Evidentiary presentations were made by the Staff, the Tribes, Montana and the Secretary of the Interior.

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aminer used as his measure of the commercial value of the Tribal lands one of the staff applications of the so-called "net benefits" approach, which we discuss in the Argument, *infra*, pp. 26-27. That study showed a total commercial value for the project lands of \$3,427,000, of which 25 percent was allocated as the Indians' share (R. 9734).

The examiner indicated that he viewed the "profitability" method, which one of the witnesses for the Tribes had used, as a realistic and impressive demonstration of the project's operations which provided significant support to the upward adjustment of the charges fixed by him (R. 9730). He rejected it, however, as an absolute basis for fixing the new charges primarily because it was a form of profit sharing that he believed not contemplated nor intended by the parties when the original license was negotiated (R. 9731).

*Commission's opinion*—On October 4, 1967, the Commission issued its Opinion No. 529, which in large measure agreed with the conclusions of the examiner (R. 10063-10086, 10087).<sup>7</sup> It held that the Commission had jurisdiction to readjust annual charges pursuant to Section 10(e) of the Act; that the initial twenty-year period commenced running on May 20, 1939; that readjustment should include the third Kerr unit; and that the adjusted charge should be effective as of May 20, 1959, but at simple interest at the rate of six (instead of four) percent.<sup>8</sup> The Commission, moreover, found that the reasonable readjusted annual charge was \$950,000 (R. 10060).

In reaching this result, the Commission recognized, as had the examiner, that a number of the methods pre-

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<sup>7</sup> Commissioner Carver issued a separate but concurring opinion (R. 10088-10092).

<sup>8</sup> The Commission noted that this was fair and reasonable and in accordance with other of its holdings in analogous cases and approximating prevailing commercial rates. In so finding it declined to perpetuate the four percent rate applied in the third unit case as so "unrealistically low" as to unjustly enrich petitioner at the expense of the Tribes (R. 10071).

sented for showing the commercial value of the lands, as well as the formulas for determining the Indians' share thereof, had some support as well as some shortcomings.<sup>9</sup> After considering the various methods of computing the value of the project, it concluded that the profitability method as presented by Mr. Van Scoyoc (which we discuss, *infra*, pp. 27-32) most conforms to the statutory intent of ascertaining the commercial value on the basis of the most profitable purpose for which the Tribal lands are used (R. 10079). The commercial value shown by this adopted study was \$2,254,000. The Commission added that if it had used the net benefits approach as its commercial value yardstick, as had the examiner, it would find that value to be \$2,500,000.<sup>10</sup> In determining the share of that value that should be allocated to the Indians, the Commission regarded as invalid the assumption underlying the examiner's 25 percent allocation that the damsite and the lands under the reservoir had equal value. It found instead that the proposal of Tribes' witness Sporseen to allocate 42.13 percent to the Indian land was the most appropriate (R. 10086).

Petitions for rehearing were filed by Montana and by the Tribes, but upon reconsideration the Commission re-

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<sup>9</sup> It noted (R. 10078): "After spending considerable time over the various methods advanced, it becomes quite evident why Congress, the Court, previous Commissions and Examiners, and the Examiner herein are exceedingly general in their expressions on the subject. It also explains why the parties appeared most reluctant to discuss this particular issue at the oral argument, notwithstanding that this was the most difficult and most important issue. There is no one right method—all the others being totally wrong. Rather, there is a logic and rationality supporting most of the computations, but also obvious shortcomings."

<sup>10</sup> Specifically the Commission said (R. 10080, fn. 8): "We, of course, recognize that the net benefits method has been used, at least in some fashion, in prior determinations. As among these variations, but without recounting the merits and demerits of each of the several variations advanced, we believe that Staff's C computation of \$2,550,400, which approximates Sporseen's \$2,474,000, to be the most reasonable based on our analysis of the record. In the absence of the Van Scoyoc method which we consider more reliable, we would be persuaded that the commercial value of the Kerr project approximates \$2,500,000."

affirmed its original order on March 21, 1968 (R. 10157-10158).<sup>11</sup>

The petitions for review followed.

## ARGUMENT

### I. The Commission Had Jurisdiction to Fix Readjusted Annual Charges

Montana begins its attack on the Commission's order by asserting that the Commission was without jurisdiction to fix readjusted annual charges (Br. pp. 11-35). In support of this contention it argues that both the statute and the license preclude the exercise of such jurisdiction by the Commission and attempts to bulwark the argument by suggesting that its exercise would raise a constitutional issue avoidable (in Montana's view) by allowing the matter to go to arbitration. We shall show that both of those contentions are without merit.

#### A. *The Statute and the License Do Not Prevent the Commission from Exercising Its Jurisdiction to Fix Readjusted Charges*

Among the statutory conditions imposed in all licenses by the Federal Water Power Act in its original form (Act of June 10, 1920, 41 Stat. 1063) ~~was one~~ providing for annual charges and their readjustment. Specifically, Section 10(e) then provided (41 Stat. 1063 at 1069):

\* \* \* [W]hen licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods

<sup>11</sup> Commissioner Carver dissented to the majority's failure to decide whether the Secretary was entitled to the veto power he had previously claimed (R. 10159-10160) in the light of his letter to the Commission (R. 10099) "accepting" the result of the Commission's decision.

of not less than ten years thereafter in a manner to be described in each license \* \* \*.

Montana's license, issued in 1930 when that language was in force and when the Commission was still composed of the Secretaries of War, Interior, and Agriculture,<sup>12</sup> provided as a procedure for readjusting annual charges that (R. 8861):

\* \* \* In case the licensee, the Commission, and the Secretary of the Interior can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in the United States arbitration act \* \* \*.

In 1935 Section 10(e) of the Water Power Act was amended to specify uniform readjustment procedures. The new section states that charges would be readjusted "by the Commission \* \* \* upon notice and opportunity for hearing". Section 10(e), *infra*, pp. 47-48.

The Commission soundly concluded that Congress intended this procedural requirement that readjustments be made by the Commission after an opportunity for a hearing to apply to all licenses, and that it was fully within Congress' authority thus to modify any conflicting procedures specified in existing licenses.

The amendatory language was one of a series of largely corrective or clarifying amendments to the original Water Power Act sponsored by the Commission at the time that Congress by the adoption of Parts II and III of the Act vested the Commission with broad new jurisdiction to regulate electric utilities. The amendment to Section 10(e) was adopted, as stated in the Committee reports, to make clear "such readjustment shall be made 'by the Commission' \* \* \*." Sen. Rep. No. 621, 74th Cong., 1st Sess. (1935), p. 45; H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935), p. 24. As the Commission observed (R. 10065), it was certainly not unreasonable for Congress to con-

<sup>12</sup> The Power Act was amended later in the same year to provide for an independent five-member Commission. Act of June 23, 1930, 46 Stat. 797.

clude that the readjustment of annual charges for the use of government dams or structures on Indian lands should in all instances be determined by an independent commission with established expertise on the technical matters relating to determining their value for power development<sup>13</sup> rather than by an arbitrator who could at best enjoy *ad hoc* familiarity with the underlying technical and legal complexities. Moreover, in addition to allowing the opportunity for hearing, Congress also furnished all parties, including the licensee, with the opportunity for obtaining full judicial review.

Not only did the 1935 amendments intend to assure uniform and fair readjustment procedures, but, contrary to Montana's claim (Br. pp. 16-23), Section 28 of the Act did not bar Congress from applying such procedures to pre-1935 licenses. That section provides:

That the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

As the Commission held (R. 10064), the section precludes Congress from impairing substantive rights<sup>14</sup> but it does not prevent Congress from making new procedures applicable uniformly to new and existing licenses.

<sup>13</sup> The Commission's regulations had, since 1921, provided that annual charges for Indian lands should be based "upon the commercial value of tribal lands involved, for the most profitable purpose for which suitable, including power development." This criterion was written into Montana's license (R. 8861).

<sup>14</sup> In *Annual Charges Payable by Licensees*, 31 FPC 1555 (1964), to which Montana refers (Br. p. 21, n.\*), a number of pre-1935 licenses provided, by express reference to then existing regulations, that the *amount* of annual charges specified therein would not be increased above a certain level. The Commission concluded that this limitation clearly constituted a substantive right and remained binding upon it even though the 1935 amendments stated that any annual charges may be adjusted from time to time. Similarly here the Commission observed (R. 10064-10065) that the substantive criteria stated in the license for determining the basis of the annual charges were controlling.

Precisely this issue was raised and decided, contrary to the contentions of Montana (Br. p. 24), in *Pennsylvania Power & Light Co. v. F.P.C.*, 139 F. 2d 445 (CA 3, 1943), certiorari denied, 321 U.S. 798 (1944). There the petitioner contended that the Commission had no jurisdiction to require certain sums to be placed in earned surplus rather than project accounts. It argued that the Commission's action, while not specifically under Section 14, would control the net investment determination under Section 14. Pointing out that under the 1920 legislation which was in existence when its license was issued, the determination of project net investment was to be by agreement or by a District Court proceeding, not by Commission action as permitted by the 1935 amendment to Section 14 of the Act, it claimed that a determination of net investment had been made by the Commission in derogation of its vested rights.

The court of appeals disagreed. After finding that the order to transfer the sums to surplus was right, the court added (139 F. 2d 445, 453):

\* \* \* [T]he licensee had no vested right to have its investment determined by one procedure rather than by another at least so long as it was accorded a right to be heard and an ultimate judicial review. Accordingly the change of procedure which the 1935 amendment brought about did not, as applied to the present proceeding, violate the Fifth Amendment. \* \* \*

The above quotation shows clearly that, contrary to Montana's assertion, the court in *Pennsylvania Power & Light* did not consider that claim irrelevant to its decision; rather it held that Congress, notwithstanding Section 28, upon which the licensee had specifically relied,<sup>15</sup> could and did specify new procedures in 1935 applicable to all licenses.

Montana's discussion (Br. pp. 25-26) of *Safe Harbor Water Power Corp. v. F.P.C.*, 179 F. 2d 179 (CA 3,

<sup>15</sup> *Pennsylvania Power & Light Co. v. F.P.C.*, CA 3, No. 8107, Brief for Petitioner, p. 41.



1949), certiorari denied, 339 U.S. 957 (1950), again demonstrates its determination to ignore the substance-procedure distinction which the Third Circuit recognized in that case as in *Pennsylvania Power & Light, supra*. In *Safe Harbor* the Commission's first attempt to deal with Safe Harbor's rates under Section 20 of the Act had been reversed for want of a finding that the States concerned were not cooperating to perform the regulation themselves.<sup>16</sup> On remand the Commission found that the States were in fact not cooperating, and also that Safe Harbor was subject to regulation as a public utility under Part II of the Act. Resting its order on the authority of both Part I and Part II, the Commission specifically rejected the contention that this was precluded by Section 28 of the Act stating (5 FPC 221, 243):

\* \* \* One other contention advanced by Safe Harbor in regard to jurisdiction should be noticed. Safe Harbor contends that it cannot be regulated under any provisions other than those in section 20, because it construes its license to be a contract, and argues that the effect of section 28, which saves outstanding licenses from alteration, together with its license, issued subject to the provisions of the Federal Water Power Act of 1920, is to protect the license from alteration by Congress without Safe Harbor's consent. It does not contend that the rate fixed by this Commission under section 20 would be any different from that fixed under Part II. Safe Harbor's objection, then, amounts to no more than that Congress is without power to substitute determination by one agency, for that by another. The alteration opposed here is one of procedure, and procedural changes may be effected without consent of the "licensee". [Footnote omitted.]

The Court of Appeals agreed, finding no substantive difference between the scope of rate regulation under the two Parts of the Power Act; the court said (179 F. 2d 179, 188):

<sup>16</sup> 124 F. 2d 800 (CA 3, 1941), certiorari denied, 316 U.S. 663 (1942).

\* \* \* If, as we have held, the provisions of Section 206 properly are to be read in the light of Section 20 in fact making the provisions of Section 20 (*sans* the "net investment" language of Section 3(13)), the equivalent of those of Section 206, *the rights of Safe Harbor as a licensee are preserved, the requirements of Section 28 are met* and regulation of Safe Harbor's rates may proceed \* \* \*. [Emphasis added.]

The court clearly held, in other words, that since the substantive rights of Safe Harbor were the same under one section as under the other, the company could not complain about the Commission's fixing its rates even assuming the procedural predicate to Commission action under Section 20 (a showing of lack of State cooperation) had not been met. Montana, however, claims that *Safe Harbor* means that "only amendments that incorporate and continue the provisions of the Act originally applicable to the licensee can be enforced by the Commission consistently with Section 28." (Br. p. 26). However true this may be of provisions governing substantive rights, it is not the rule of *Safe Harbor* so far as procedure is concerned.<sup>17</sup>

The consistent conclusion reached in these cases is, we submit, clearly correct. Montana's broad claim that Congress by enacting Section 28 forecloses itself from altering any procedures with respect to Part I licenses in existence prior to making a change is plainly too extreme. Indeed, the very language of the section seems to refute such a construction. For the basic Congressional reservation to alter, amend or repeal the Power Act would be rendered meaningless if petitioner is correct since Congress is obviously free to prescribe different standards for prospective application by the Commission in granting new

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<sup>17</sup> Montana erroneously suggests (Br. p. 26) that the court's decision depended upon approval of the Commission's findings that it also had Section 20 jurisdiction because the States were unable to agree. The court observed that its conclusions in that respect were academic and expressed only for the benefit of a reviewing court if it disagreed on other points (179 F. 2d at 189).

licenses both substantive and procedural. Thus, the affirmative reservation is meaningful only if it is construed to permit changes in procedures while the second clause bars changes of substance. This is, of course, consistent with the Congressional objective of providing sufficient investment security to licensees to encourage private development of the nation's waterways. For such investment security cannot reasonably be regarded as to any material degree dependent on immutably preserving the particular review or readjustment procedures being used at the time a license is issued.

It is next necessary to determine whether the "right" to arbitration, claimed by Montana, is substantive or procedural in the present context. Montana concedes that "entry into a contract does not vest a party with a right to a specific procedure for the enforcement of contract rights, so long as those rights can be enforced." (Br. p. 27). But it contends that the arbitration provision in its license conferred more than a procedural right upon it, both because arbitration has been characterized as substantive in a different context and because the provision was allegedly an important factor in the negotiation leading up to issuance of the license in 1930.

The cases relied upon by Montana (Br. pp. 28-29) do not, however, support the result it seeks. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), was a diversity action in a federal district court, involving a contract entered into in another State which included an arbitration provision. The district court denied defendant's request for a stay to permit arbitration on the ground that under local law the arbitration provision could not be enforced. The court of appeals disagreed, holding that arbitration was a procedural matter governed by federal law under the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Supreme Court reversed. But in holding that arbitration was not procedural for *Erie* purposes, the Court made it clear that it was not deciding on its nature generally. It said (350 U.S. 198, 202-203):

\* \* \* We deal here with a right to recover that owes its existence to one of the States, not to the United States. The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, in spite of that difference in procedure, the federal court enforcing a state-created right in a diversity case is, as we said in *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, in substance "only another court of the State." The federal court therefore may not "substantially affect the enforcement of the right as given by the State." *Id.*, 109. \* \* \*

Since the remedy by arbitration could result in a radical difference in ultimate result, the policy of *Erie* that the accident of a suit by a non-resident litigant in a federal rather than a State court should not lead to a substantially different result called for treating arbitration as substantive for that purpose.<sup>18</sup>

The fact that the availability of arbitration is not to provide a basis for forum shopping in diversity suits, does not make it substantive for all other purposes, including the power of Congress to modify procedures with respect to existing federal licenses.<sup>19</sup> Here the issue is not one

<sup>18</sup> *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F. 2d 402 (CA 2, 1959), certiorari granted, 362 U.S. 909, writ dismissed, 364 U.S. 801 (1960), upon which Montana also relies, is similar. There the United States Arbitration Act applied to the contract in issue and the court found that the validity of the agreement to arbitrate was to be governed by federal substantive law, regardless of whether the action was in a State or federal forum. The court in *Robert Lawrence* noted that for many other purposes arbitration had been viewed as procedural. 271 F. 2d 402, at 405-406, fn. 3.

<sup>19</sup> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." \* \* \* Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 337 (1933). It has become increasingly clear that *Bernhardt* and decisions following it are addressed to diversity questions and not to the general question of whether arbitration is a matter of "sub-

of preventing forum shopping with respect to a State-created right. Instead, Montana's insistence upon a right to arbitration is essentially a claim that, as a matter of due process, Congress could not substitute readjustment by the Power Commission after opportunity for hearing and review for readjustment by arbitration. In *Berkovitz v. Arhib & Houlberg, Inc.*, 230 N.Y. 261, 130 N.E. 288 (1921), the Court of Appeals of New York was faced with the question whether the State's new Arbitration Law could be applied to contracts entered into before its enactment. The court, in an opinion by Judge Cardozo, said (130 N.E. 288, 290):

\* \* \* Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing.

This is, in a nutshell, what has happened in the instant case. Montana became subject to certain substantive rights of others and acquired substantive rights for itself, by accepting a license. These rights were to be redistributed, in part, after twenty years. One mode of doing so was prescribed at the time, and in the interim Congress substituted another.

Finally, Montana attempts to show the substantive nature of the arbitration provision in the license by its claim (Br. pp. 13-16, 29) that the inclusion of the arbitration provision in the license for readjusting annual charges was an important element of the negotiations leading up to the issuance of the license to it in 1930. Aside from the fact that Congress is not foreclosed from changing the procedures for enforcement of the rights under licenses or contracts merely because the parties thereto considered

stance" or of "procedure" for all purposes. See, for example, *Turkish State Railways Administration v. Vulcan Iron Works*, 230 F. 2d 108, 110 (CA 3, 1956); *Local 19 Warehouse Processing and Distributive Workers Union v. Buckeye Cotton Oil Co.*, 236 F. 2d 776, 780 (CA 6, 1956).

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the procedure to be important (see, e.g., *Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437 (1903)), the contention that the type of the readjustment procedure was an important consideration in Montana's license negotiations is not supported. lead

As Montana points out (Br. pp. 14-16), the amount of annual rentals, as well as whether these rentals should be on a flat basis or based upon the actual use of the licensed facilities, was the subject of considerable study and negotiation. The report prepared by Mr. Scattergood (Mont. Br. p. 14), includes various government agency proposals for rental schedules. The report includes a memorandum dated December 30, 1929, from Mr. Scattergood, the Assistant Commissioner of the Bureau of Indian Affairs, concluding that the rental proposals of both Montana and a competing applicant were inadequate in amount (R. 8229-8276). A second memorandum from the Bureau of Indian Affairs, dated May 14, 1930, reports to the Secretary of the Interior that studies made by engineers of the Power Commission and the Army Engineers supported the judgment of inadequacy (R. 8277-8284). Each of these studies, which used different methods under which the charges would be based to some extent on actual energy output, was included in the report. Mr. Scattergood explained that one of the plans which contained a minimum rental was not satisfactory to the company and that all these plans posed difficulties "in providing against any possibility of the use of the Flathead plant for peaking purposes only or in dull times the giving to it of only a reduced proportion of the entire system load, and in general the avoiding of the temptation to starve this plant in order to reduce the Indian rental" (Report p. 51, R. 8279). He also explained that after extensive but abortive negotiations and discussion of "those various plans and the variables upon which they were based" a flat rental plan was agreed to. The report also noted (p. 53, R. 8281) that the amounts suggested in each of the several government agency proposals based on actual energy output ap- lead

proximated in the zone of probable power development the flat rental schedule.

While this report reflects great concern over the amount of rentals, with particular emphasis on fairness to the Indians, nothing indicates a like concern over the method of readjustment. All that appears in the report as to readjustment provision is a clause in the rental schedule proposed by the Commission's Executive Secretary under which the Commission would make the readjustment upon the facts it found to exist (Report, p. 63, R. 8291), and the arbitration clause included in the agreed-upon rental schedule (Report p. 52, R. 8280) and subsequently incorporated in the license. In view of the extensive negotiation over the rental amounts between the company and the Department of the Interior in its role of representing the Indians, the agreement to permit the readjustment to be initially fixed by arbitration may well reflect the Secretary's potentially conflicting responsibilities at the time in his dual role as a member of the Federal Power Commission and as the representative of the Indians' interests. Whether the arbitration clause was proposed by the Secretary, as Montana indicates (Br. pp. 15, 16, 34) or by Montana, it would appear that the resort to arbitration was specified to leave any readjustment to a disinterested independent agency. Plainly, the Congressional requirement in 1935 for readjustments by a then independent Commission is in no way inconsistent with this.<sup>20</sup>

<sup>20</sup> Since the Commission concluded that Congress did and could provide for readjustment by the Commission after hearing in lieu of readjustment by arbitration, it had no occasion to pass on contentions of various parties (R. 9718-9719) that, in any event, the arbitration clause was inoperative because the United States Arbitration Act did not apply; that it at best contemplated Commission action after arbitration; and that the 1936 amendment to the Montana license (R. 9044-9061), which permitted completion of construction without which operation was not possible, in legal effect was a new license for the entire project which necessarily incorporated all the provisions of the Act as amended in 1935.



***B. Since the Secretary of the Interior Has Accepted the Commission's Determination Its Order Is Plainly a Final Order Reviewable by the Court***

Montana's second jurisdictional argument stems from the Secretary of the Interior's assertion of a "veto power" over the results of the annual charge readjustment (Br. pp. 30-35). It argues that this asserted power deprives this Court of jurisdiction to review the case (since courts will not, as a matter of constitutional law, enter judgments that may be revised by the Executive). It goes on to contend that as a consequence the Commission's order was a nullity though allowing the charges to be readjusted by arbitration would allegedly remove these difficulties. This position is also without substance.

Throughout the proceedings, the Secretary of the Interior contended that he had a right to disapprove any readjustment of annual charges ordered by the Commission. The alleged power of disapproval does not extend to the setting of a higher level of charges in lieu of that disapproved. That can be done only by the Commission after a new proceeding (should it choose to institute one). If the Secretary has the power he asserts he could forestall any reduction in the charges, but if he disapproves an order increasing them the effect would be to leave them at their original level.

While at one point during the proceeding the Secretary indicated (Mont. Br. p. 30, R. 9631-9632) that his views as to the acceptability of the Commission's findings might not be stated until after appellate review, by letter of November 3, 1967, i.e., within the time available for seeking rehearing of the Commission's order, he approved the Commission's findings (R. 10099). Since the Secretary had thus accepted its determination, the Commission, concluding that the existence of the Secretary's alleged veto power was no longer in issue, expressed no views as to the validity of the Secretary's claim.

Since the Secretary has expressly refrained from exercising any authority he may have to veto the decision, any residual question of the propriety of judicial action

subsequently "reviewable" by an agent of the federal Executive no longer exists. To be sure, if the Commission's findings are deemed insufficient on review to support its readjustment determination, the Secretary would once again be free to assert any authority he thinks he possesses with respect to any new administrative determination the Commission might make on remand. But in that case he would be reviewing not the court's decision but the Commission's. Regardless of whether or not the Secretary has any role with respect to readjustment of the charges other than as a party before the Commission and before the courts in a proceeding reviewing the Commission's order, his failure to seek to overturn the order challenged here by Montana would certainly not bar his challenge of later Commission orders made necessary by a remand. In short, even assuming it might otherwise not be the case, the finality and hence reviewability of the Commission's order is clear where the Secretary, as here, has approved the challenged Commission action.<sup>21</sup>

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<sup>21</sup> The cases cited by Montana (Br. p. 32) would not support its argument even if it were admitted that the Secretary had the power he asserts. In *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), the C.A.B. order involved had been issued only after modification and approval by the President, who had full authority to revise the action of the agency. The Court concluded such orders are not final before Presidential review and after such approval embody Presidential discretion as to international affairs beyond the competence of the courts to adjudicate. Here the Commission's order, even if subject to veto, could not be affirmatively changed by the Secretary. Moreover, as the counsel for the Secretary conceded (R. 1564A), his "veto" action, unlike the President's ruling in *Waterman*, is fully subject to judicial review.

The other cases (*In re Sanborn*, 148 U.S. 222 (1893); *Gordon v. United States*, 117 U.S. 697 (1864) (this opinion of Chief Justice Taney was not a decision of the court, see *United States v. Jones*, 119 U.S. 477 (1886)); *United States v. Ferreira*, 13 How. 40 (1851); *Hayburn's Case*, 2 Dall. 409 (1792)) generally involved situations where the court's decision that an award of compensation was appropriate constituted no more than an advisory decision since an executive department officer had the final authority as to whether any award should be made. This is, of course, not the case here.

Finally, it should be noted that the Secretary not only asserted, but in the first instance invoked a veto power in the Third Unit case (*Montana Power Co. v. F.P.C.*, *supra*, p. 4, n. 4); this Court, with full knowledge of the claimed power (112 AppDC at 10, n.2, 298 F. 2d at 338, n.2), nevertheless exercised its jurisdiction to review the Commission's supplementary decision which the Secretary accepted. There is no difference in principle between that case and this. In both, the Commission has entered an order which the Secretary officially approved. If the Court could hear the Third Unit case without exceeding its jurisdiction, there is no apparent reason why it cannot do so here.

Even if the arguments made by Montana on these points were correct, they would not demonstrate that arbitration should have been permitted. Despite Montana's assertion to the contrary, allowing the matter to go before arbitrators would not remove the problem created by the Secretary's alleged power of veto. As the Secretary pointed out (R. 10020-10021), if he has the power to veto a Commission decision the same statutes that clothe him with that power (as an adjunct of his responsibility to the Indians) must equally make it possible for him to veto an arbitration award. Montana argues (Br. p. 35) that it would be useless for him to do so:

\* \* \* [I]f he could veto an award increasing the present annual payments, the effect would be to leave the payments at their present level, and as trustee for the Tribes his interest is in the highest payment possible.

This gives the case away, for the situation is identical under a Commission-determined increase.

## II. The Commission's Determination of the Appropriate Annual Charges for the Use of Tribal Lands Fully Satisfies the Standards Prescribed by the Statute and the License

Under Section 10(e) the Commission is required to fix a reasonable annual charge for the use of Indian lands

at the time a license is issued and may readjust such charges at the end of twenty years after the project is available for service. The order challenged here prescribed readjusted charges. In determining the appropriate level of the annual charges the Commission was guided by the Section 10(e) standard of reasonableness and the license provision that readjusted charges should be (R. 8879)

\* \* \* reasonable charges fixed \* \* \* upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development.

***A. The Commission Readjustment Based on De Novo Determinations of Commercial Value Was Fully Supported***

Preliminarily the Commission concluded (R. 10074) that in order to achieve this objective it was necessary to determine the commercial value of the Kerr project *de novo*. It rejected Montana's argument, which it repeats here (Br. pp. 36-38), that the determination should be limited to modifying the annual charges previously determined to reflect any changed circumstances. As the Commission found (R. 10074), "the reasonable commercial value of the land cannot be determined by considering individual factors in isolation." It also pointed out that the making of an overall cost or value determination was the standard practice of most regulatory agencies to ascertain the reasonableness or unreasonableness of existing rates.

This conclusion is particularly compelling here since, contrary to Montana's suggestion (Br. pp. 36-38), the report of the negotiations leading up to the agreement on the Indian rental charge in the original license provided no formula for determining the commercial value of the Kerr project. The Scattergood report discloses, as we have noted, *supra*, p. 17, that the original flat rental was agreed upon after negotiations which considered a series of formulas which would have provided for varying

charges. While it appears that the proposed charges based on these formulas played a role in arriving at the flat rentals, none was considered dominant; however, it is clear that a significant factor in adopting the flat rentals was the uncertainty of how Kerr would be operated after construction. Since the actual factors resulting in the original rental agreement are not known, Montana's claim that the readjustment could modify the charges only for known changes ignores that no one knows what factors need to be adjusted. Its position that only physical changes should be considered is plainly at odds with the original agreement on the flat rentals which in large measure reflected a desire by the government agencies involved to protect the Indians from company attempts to underuse Kerr to avoid rental payments.<sup>22</sup>

***B. The Commission's Annual Charge Determination  
Was Reasonably Based on a Considered Evaluation  
of the Record as a Whole***

In making its determination of the appropriate annual charges the Commission considered the various presentations of Montana, the Tribes, the Secretary and its staff which were directed to showing the commercial value of the lands on either a profitability or net benefits basis and the appropriate share thereof that the Tribes should receive. The commercial value of the project testified to on these bases ranged from \$1,410,000 to \$3,427,000, while the proposed rental charges related thereto ranged from \$352,500 to \$1,667,000 (R. 10076).

In addition, Montana proposed several methods for determining the rental charges which the examiner and

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<sup>22</sup> Montana also asserts (Br. p. 37) that the Commission did not find its current charges unreasonable. While the necessity for such an express finding is doubtful at least where, as here, a new determination is in any event required, the examiner specifically found (R. 9728) that Montana's several proposed charges, all of which were slightly higher than the current charge, "are considered \* \* \* to be unreasonably low \* \* \*." The Commission not only adopted this finding (R. 10087), but also specifically found that the company's "proposals are not reasonable \* \* \*" (R. 10086).

Commission viewed an unrealistic and not really attempting to assess the actual value of the project (R. 9728, 10077). These would have resulted in charges of \$248,102, \$258,830 or \$270,000, compared to the existing rental of \$238,375. One plan carried over without change the charges fixed for the third unit, and based the charges for the first two units upon a Commission formula used for assessing annual administrative costs (R. 9726). Not only did this scheme fail to assess the overall value of the project, but the administrative charges formula was not intended to make any value assessment. A second proposal was based upon an application to Kerr of a formula devised by *agreement* between the Warm Springs Indians and Portland General Electric Company for the Pelton and Round Butte projects (R. 9727). The unit capacity and energy rental charges for the Pelton and Round Butte installations were applied to capacity and output of Kerr. Apart from the fact that the similarity of Pelton and Round Butte to Kerr was not shown or why the agreement of other parties should be controlling, the Pelton agreement provided an entirely different schedule for readjustment of annual charges (R. 9727). The third of these methods used the existing rentals as a starting point and then attempted to evaluate the effect on value of only physical changes said to have taken place since Kerr was licensed in 1930 (R. 9726). As we have noted, *supra*, pp. 22-23, such a readjustment based on isolated factors is not meaningful.

After considering all of these proposals, together with the showing of the significant role played by the Kerr project on Montana's system (R. 10086), the Commission determined that the readjusted annual charges should be fixed at \$950,000. While this particular amount was basically derived by allocating to the Indians' lands 42.13 percent of the site value of \$2,254,000 testified to by Mr. Van Scoyoc using the profitability approach considered most reliable by the Commission, the Commission also found (R. 10080) that if it were compelled to use the net benefits approach it would find the commercial value of the Kerr project to be \$2,500,000, about a quarter of a

million dollars more than the Van Scoyoc result objected to by Montana.<sup>23</sup> Montana's assertion (Br. p. 39) that the Commission's conclusion as to the commercial value of the project on a net benefit basis determination is not a finding is at best a tautological quibble; it is clear that this determination of the commercial value under the net benefit approach, which if used as the yardstick would have resulted in a higher ultimate payment, was an operative fact in the Commission's ultimate determination and would be a sufficient basis for the present decision.<sup>24</sup> Thus, in denying rehearing, the Commission said (R. 10158):

Both the Tribes and Montana improperly assume that the Commission's determination was based exclusively on the profitability method of Van Scoyoc and the allocation factor of Sporseen. This was not the case. The Commission's decision was based on the record as a whole, including the role of the Kerr project as a significant element in Montana's system and a major contributor to its earning power. The decision did use the profitability method as a guide in arriving at its end result, noting at the same time that a proper application of the net benefits method would have produced approximately the same result. \* \* \* [25]

<sup>23</sup> In this respect, it found that staff's C computation of \$2,550,400 was the most reasonable application of the net benefits approach (R. 10080).

<sup>24</sup> Montana's reliance (Br. p. 39, n.\*\*\*) on *Mississippi River Fuel Corp. v. F.P.C.*, 82 AppDC 208, 224, 163 F. 2d 433, 449 (1947), is misplaced. That case holds only that if a case is based on a particular formula, the order will not be approved if the formula has been misapplied. But this does not mean that the Commission must rest a decision on the application of a particular formula where it can and does conclude that application of another formula would support the same result.

<sup>25</sup> In upholding the Commission's determination of the annual charges to be imposed for the third generating unit installed on the Kerr site, this Court stated that the question it had to decide was "whether the end result is a reasonable one, as the statute requires it to be," not whether a particular method was properly adopted and correctly applied. *Montana Power Co. v. F.P.C.*, 112 AppDC 7, 12, 298 F. 2d 335, 340 (1962).



Montana's challenge to the profitability method deemed to have controlled the Commission's decision is thus misdirected. As the Commission observed, proper application of the net benefits method would, as the examiner also recognized, have placed a substantially greater value on the project than does application of the profitability method.<sup>26</sup> Montana proposes no alternative rational method for redetermining the value of the project lands but is highly critical (Br. p. 42) of a determination based on the "record as a whole." But the consideration of the record as a whole the Commission engaged in here was essential to a fair and lawful determination. Specifically, reliance upon one method without consideration of other acceptable means of evaluation would have been in gross disregard of the Commission's duty to determine a reasonable value. Where there is more than one path to an end result, all viable ones must be given consideration.

***C. The Commission's Yardstick Method For Determining the Commercial Value of the Kerr Site Was Appropriate***

In order to appraise properly the objections to the profitability approach, the reasons for the Commission's preference for that approach as providing the best yardstick for fixing the amount of annual charges should be understood. The net benefits method, as the Commission viewed it (R. 10077), seeks to determine the annual value of a project by computing the amount by which the annual cost of production of project power is less than the annual cost of producing an equivalent amount of power by the most likely alternative at the time the project was constructed. In using this approach, it is necessary to spec-

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<sup>26</sup> The value computed under the profitability method is \$2,254,000. In contrast, the examiner selected the proposal of staff's witness Shepley, which was in the amount of \$3,427,000, as the most reasonable assumption of all the alternates in the record (R. 9734). Two other staff analyses produced net benefits of \$2,529,000 and \$2,550,400; that of the witness for the Secretary, \$2,981,666; the Tribes witness, \$2,474,000; and Montana's witness, \$1,410,000 (R. 10076).



ulate, *inter alia*, as to which project or projects would have been constructed if the subject project had not been built, what the relevant costs were at the time of construction, what the fuel costs might have been and so forth. The difficulties in the approach are reflected by the variations in its application by different experts. See R. 10076, 9727-9733. The profitability method presented here determined the share of the company's total electric revenues reasonably attributed to Kerr and also the annual costs of producing power at Kerr, including a reasonable rate of return on the net investment of the facility but exclusive of the site rentals which were the unknown to be determined. The annual costs deducted from the annual revenues reflected the actual commercial value of the Kerr site or the profitability of the development to the company (R. 456).

While the Commission observed that "[t]here is no one right method—all the others being totally wrong" (R. 10078), it concluded that on balance the profitability method most nearly conforms to the statutory intent of ascertaining the value of Kerr for the most profitable purpose for which the tribal lands are used, which the parties all agreed is for power production (R. 10079), and, in addition, unlike the net benefits approach which requires speculative assumptions as to alternative energy sources in the past, is directly concerned with the actual operation of the project considered.

The profitability approach provided a logical basis for evaluating an unknown—the commercial value of the Tribal lands in their role as a productive asset of the project. Since it has no known investment value, unlike the other properties used in Kerr's operations, and since a reasonable return on the latter properties was included in the cost of service, the excess of revenues allowable to the project above its costs of operation, in including the return but exclusive of payment for the Indian lands, reasonably represents a return on the site. Comparably, the value of ground rights which may be leased for construction of a building will be determined

primarily by the net return, estimated or known, obtained from its rentals. Cf., *Galveston, Harrisburg and San Antonio Ry. v. Texas*, 210 U.S. 217, 226 (1908); *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 526 (1941).

1. *The profitability method was soundly applied*

Montana makes two specific objections to the application of the profitability approach. First, it claims (Br. pp. 40-43) that the Van Scoyoc study (R. 454-517A, 1557-1581), which the Commission adopted, used an improper allocation basis for determining the portion of Montana's total electric revenues that should be attributed to the Kerr project. Second, it contends (Br. pp. 43-45) that the treatment of headwater benefits payments was arbitrary. The Tribes in their petition argue that the evidence on headwater benefits required a higher rental allowance. None of these objections withstand analysis.

a. Montana's objection to the manner for determining the revenues that should be attributed to the Kerr project is unsound. Since Montana's books do not, of course, assign revenues to particular projects, it was necessary to determine the revenues attributable to Kerr by assigning the total company electric revenues to the various portions of the system. This was performed in two steps. First, there was an assignment among the three broad functions (generation, transmission, and distribution). This was done by determining the costs assigned to each broad category, including the average return on investment that the company's rates had generated in each year studied (R. 457-471, 1565-1580).<sup>27</sup>

The second step was to apportion the electric revenues assigned to generation among the generating plants (R. 471-475, 1561). Since the electric revenues of a power company are derived from separate charges for both energy and capacity, the generating revenues were assigned to Kerr on the basis of its generation and capacity (R.

<sup>27</sup> The actual returns earned ranged from 8.90 percent to 11.19 percent on total net investment (R. 1579, 9722).

475-476, 483-493, 505-510, 1558-1560, 1562, 1563). Montana contends it was unreasonable not to assign such revenues on a net investment basis. But an assignment of revenues on that basis would have been at odds with reality because it would have ignored the contribution to the system capacity and generation of the Tribal lands that would not be included in the rate base (see R. 681-685, 792-798).

Montana's assertion that when attempting to ascertain the commercial value of a project site the earnings of a power company should necessarily be viewed as stemming equally from every dollar of investment is invalid. Where the cost and revenue data as to the actual operations of the project and the system of which it is a part are not available, as they are here, it may be appropriate if not necessary to utilize the investment base upon which the rates were set. But this is not the case where, as here, better evidence as to the actual value is at hand. The experience of the electric power industry has been that lower electricity costs will increase sales and earnings. Accordingly, the practice of the utility industry is to strive to add and use the most economic generating facilities. Moreover, while a company will charge the same for energy from whatever source it is obtained, the earnings from these charges are maximized for the company if the company can utilize its cheapest energy source. Absent instant rate regulation, a power company's retained earnings will obviously be increased by the most efficient use of its facilities. Thus, while rates may be based on investment (though Montana is a fair value State), earnings and hence value are not. More specifically, a hydroelectric plant which, because of the physical characteristics of the site, can supply twice the energy and capacity for the same investment as another facility is much more valuable to the power company than the latter facility notwithstanding the identity of investment.

The intrinsic reasonableness of Mr. Van Scoyoc's assignment of generating revenues on the basis of capacity

and energy is in no way affected by his use of an investment approach in the first step of the assignment, i.e., the apportionment of electric revenues among transmission, distribution and generation. For while production and capacity forms a common factor for comparing the contributions of generating plants, it plainly does not for the functionally different transmission and distribution facilities.<sup>28</sup>

b. Under Section 10(f) of the Power Act, a storage reservoir or other headwater improvement constructed by a licensee or by the federal government which confers benefits on another licensee is entitled to recover certain annual charges, fixed by the Commission, from such beneficiaries. Montana argues (Br. pp. 43-45) that Mr. Van Scoyoc's recommendation of the annual charges for the Tribal lands is greatly inflated by the alleged inclusion in his computation of headwater benefit payments the company received from downstream owners, while payments made to the United States for the benefits received from Hungry Horse were excluded.<sup>29</sup> This criticism does not withstand analysis.

As an analytical matter, headwater benefit payments for Kerr to the United States are properly viewed as an operating expense of Kerr. Correlatively, headwater benefit payments or other payments received by Montana for the benefits conferred by the Kerr project constitute revenues directly assignable to Kerr. However, lack of complete data precluded any such direct assignment of costs and revenues in Mr. Van Scoyoc's study (R. 477-480).

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<sup>28</sup> Montana's suggestion (Br. p. 41) that the inclusion of a steam plant in the investment used in the first step is inconsistent with the second step allocation because that plant, in one year, did not have any production overlooks that the plant would share in the electric revenues because of its capacity contribution (R. 1560).

<sup>29</sup> In this discussion, reference to "headwater benefit payments" may include not only those payments made pursuant to a Commission order under Section 10(f) of the Act but also payments for storage benefits resulting from private agreements.

Instead, in deriving both the revenues and the cost of service applicable to Kerr, Mr. Van Scoyoc excluded all headwater payments and receipts (R. 1564). While the inclusion of the unavailable data as to headwater benefit payments, both paid and received, would have resulted in a more precise evaluation, he explained that his calculation was conservative since the record did indicate that the headwater benefits provided by the Kerr storage to downstream plants exceeded Montana's payments for Hungry Horse storage (R. 481).<sup>30</sup>

Montana's contention (Br. p. 44) that some headwater payments to Montana were allocated to the Kerr project revenues by Mr. Van Scoyoc is invalid. It is true that headwater benefit receipts were included as part of the company miscellaneous revenues in Mr. Van Scoyoc's computation of system operating income (R. 1580).<sup>31</sup> But his assignment of income applicable to the Kerr site (R. 1558) was based on a division of revenues received for power supply which did not include any portion of those benefits (R. 1560, 1561, 1565-1571).

Taking the opposite position, the Tribes contended that the headwater and storage benefit payments received by the company exceeded such payments made by it by an average of approximately \$100,000 annually. Hence, it

<sup>30</sup> The only specific evidence received in this connection was a compilation of the Secretary (R. 1628) (not available to Mr. Van Scoyoc when his testimony was prepared) which showed payments by Kerr generally allocable to the years involved in the study (being based on water years 1959-1960 to 1964-1965, inclusive) totalling \$879,970 and offsetting credits totalling \$998,500 (\$558,300 attributable to receipts from non-federal projects, \$401,100 from federal projects, and \$39,100 to allocations from the company's Thompson Falls project to Kerr). The compilation, which covers a ten-year period beginning with the water year 1959-1960, forms the basis of the Tribes' contention that the Commission's determination of annual rental value should be increased by \$42,000. See, *infra*.

<sup>31</sup> Total miscellaneous operating revenue for the relevant period was \$2,795,429; the amounts credited to that account for storage payments as shown by the filed data used for Mr. Van Scoyoc's computation totaled \$413,000 (R. 479, 1580).

argues in its petition (No. 21767) that the Commission's determination of reasonable annual charges was understated and should have been \$42,000 greater to reflect the Tribes' share on the basis of the 42.13 percentage figure which was used for allocating the excess income above reasonable return on investment.

The Commission acted reasonably in declining to revise the rental charge on that basis. The Tribes' contention was based totally on an exhibit submitted in the latter stages of the hearing by the Secretary's witness listing payments to the company substantially in excess of those paid by it to the federal government over a span of ten years. Mr. Van Scoyoc's analysis was predicated upon available revenue and expense information that covered a lesser span of years during which no significant difference was shown.<sup>32</sup> There would have been no justifiable basis for employing one set of test years for determining the value of the site on the basis of power production and another to determine the excess benefits derived from headwater payments.

Furthermore, the excess of receipts over payments underlying the Tribes' claim, as shown in the exhibit, depends upon the amounts paid or credited to the company over the ten-year period by the federal government. These payments were made pursuant to a complex coordination agreement to which the government, the company and other utilities both private and public were parties involving, *inter alia*, water storage arrangements, coordination of operations, interchanges of power, and the "wheeling" (transmission) of power. The record contains information insufficient for a reasonable determination of the amounts of such payments properly allocable as headwater benefits.

## 2. *The Commission Is Not Foreclosed on Legal Grounds from Using the Profitability Approach*

a. Montana implies (Br. p. 38) that the Commission was barred from applying the profitability method be-

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<sup>32</sup> See footnote 30, *supra*, p. 31.

cause it was allegedly rejected in the original negotiations as a means of arriving at rentals. We see no support for this view which is essentially a restatement of the contention that the flat rental fee as modified only by demonstrable "physical changes" was to be the base of any readjustment (see pp. 22-23, *supra*). The Scattergood Report cited by Montana shows, to be sure, that flat rentals were adopted rather than any type of charge schedule under which the payment amount would vary from year to year depending upon the company's output or profits. But this in no way supports the present claim that the choice of flat rentals meant that anticipated profits were not relevant to the figure finally adopted. Indeed, the report suggests quite the contrary. It indicates that a schedule derived from a profit sharing approach was one of three plans considered (R. 8237, 8277-8280) and that the charges thereunder approximated the flat rental at the most likely output level (R. 8266).

b. As a further bar to the application of the profitability formula, Montana states (Br. pp. 45-46) that its use under any circumstances is inconsistent with the provision in Section 10(e) requiring payment to the United States of reasonable annual charges because of the provision therein for "the expropriation \* \* \* of excessive profits" absent State control to prevent such excessive profits and of Section 10(d), regarding the establishment by the company of amortization reserves out of surplus earnings. These claims miss the point. Neither of these determinations can even be made without taking into account the Indian rentals. The profitability method used for determining the commercial value of the Indian lands, as the Commission was obligated to do, does not "expropriate" merely because it bases the commercial value on the project's earnings in excess of the computed cost of service. It simply determines an operating expense. As we have noted, the Commission's use of the net benefits approach as its yardstick would have resulted in greater payments than the profitability approach.



3. *The Commission Allocated an Appropriate Portion of the Commercial Value of the Site to the Tribes*

Montana's objections (Br. pp. 49-52) to the Commission's determination that about 42 percent of the commercial value of the site (42.13 percent) should be allocated to the Indians are also not meritorious. Montana contends that the share of the annual site value properly payable for the use of the Tribal lands was fixed by this Court in the Third Unit case when it gave its approval to a 25 percent figure used by the Commission in fixing the payment there in issue. That apart, it argues the theory relied upon by the Commission in adopting a different allocation was without logical foundation.

There is no support for the claim that the Commission was bound to adhere to the 25 percent allocation used in the Third Unit case. The basis for the 25 percent figure was the assumption that weight should be given in equal parts (1) to ownership of all of the lands according to the respective ownership interest and (2) to the investment required for its utilization to be made by the licensee. Since land and investment were deemed to provide equal value to the project and since the Tribes were deemed to own half the land, they were held to be contributing a one-fourth share to the enterprise. In the proceeding before the Commission the ratio was not subjected to searching analysis and for obvious reasons was not challenged in court by Montana, the only petitioner. Consequently the Court which, in any event, made clear it was approving the end result of the Commission decision, not the methodology, made only passing mention of the allocation.

In this proceeding, however, neither the Tribes nor the Secretary were willing blandly to accept the allocation previously used and both submitted studies in considerable depth to support reasoned presentations as to the relative contribution of the damsite and reservoir to the value of the generating facilities. The Commission quite appropriately considered all the approaches on their merits, including the one utilized in the earlier case, and adopted the one deemed most reasonable.



An allocation based upon the relative amounts of land within project boundaries owned by the parties gives no greater weight to the importance of the damsite upon which the dam and powerhouse are situated—entirely owned by the Tribes—than it does to the most remote portion of the reservoir which serves it (R. 63). Yet the damsite, even if used with a much smaller reservoir or as a run-of-the-river dam would have substantial value as the record demonstrated. Since the damsite owned entirely by the Tribes constitutes only about one percent of the land involved in the Kerr project—the reservoir constituting the remaining 99 percent—the Commission obviously cannot be said to have acted irrationally in rejecting an allocation based solely on land ownership. As the Commission pointed out (R. 10084), the curious result of the application of that formula, which treats all the land of a site indiscriminately regardless of its function, was shown by the Secretary in his brief to the Commission. By using different assumptions as to land ownership the following results would be obtained:

OWNERSHIP		PERCENTAGE SHARE	
<u>Tribes</u>	<u>Montana</u>	<u>Tribes</u>	<u>Montana</u>
Damsite and lake bed		50	50
Damsite and ½ lake bed	½ lake bed	25	75
Damsite	Lakebed	1	99
½ lake bed	Damsite and ½ lake bed	24	76
Lake bed	Damsite	49	51

The method adopted by the Commission recognized, as did several other approaches, that the value of the Kerr project stems from three factors. These are the damsite (owned by the Tribes), the reservoir (the proprietary interest in which is equally divided between the Tribes and Montana) and the releases from the upstream federally owned Hungry Horse dam. Actually, the effect of the Hungry Horse releases is to enhance the value of the other factors. Having isolated these factors, it was then necessary to determine the proper weight each contributed to the value of the total site.

For this purpose, it was shown on the record that during critical water conditions Kerr generation totals 1069 MW (Megawatt) months: there would be 161 MW months of generation with the natural stream flow; the releases from Hungry Horse storage contribute 657 MW months; and the Flathead Lake storage (the Kerr reservoir) contributes 251 MW months (R. 10081).<sup>33</sup> This meant that the generation at the damsite, without any Flathead storage reservoir, would contribute 818 MW months generation or 68.5 percent of the total (R. 10082).

Having determined the relative contribution to the overall value of the damsite and the reservoir, the Indians' share of each portion had to be determined. In this regard, the Commission agreed with Montana that the value of each component stemmed jointly from the combination of land and water. Plainly, a damsite without water is useless and vice versa. Accordingly, half of the damsite's value (34.25 percent of the total) was assigned to the Indians who owned all the underlying land and a quarter of the reservoir's value (about 8 percent of the total) was assigned to the Indians whose ownership interest therein was limited to half the land underlying the reservoir. It should be noted that Montana mistakenly states (Br. p. 51) that the entire flow of the water from Hungry Horse was attributed to the Indians; to the contrary the enhanced value from that source was necessarily shared by the Indians and Montana in the amounts just indicated.

Montana contends (Br. p. 50) that any analysis of the components of flow is unreal because there has been a merger of the stream flow into the reservoir waters. However, the fact that maximum benefits of the site are developed through a storage dam rather than a run-of-

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<sup>33</sup> This figure was adjusted upward by a factor of 1.5 for the purpose of weighing the relative importance of the dam and storage to take into account that Kerr "storage should probably have some additional credit for re-regulation of releases from Hungry Horse, simplifying operations at Hungry Horse and daily and weekly pondage for Kerr Power Plant" (R. 1494, 1501, 10083).

the-river dam does not mean that the benefits from each component cannot be ascertained either before construction or, in this case, afterwards. Since quite different types of dams may be built at a particular site such a study is certainly realistic. Moreover, the record supports fully the generation data upon which the foregoing analyses were based—a fact Montana does not dispute. Finally, Montana unrealistically asserts (Br. pp. 44, 51) that the enhanced value of the Kerr project resulting from the upstream Hungry Horse project should be ignored. The Commission correctly rejected this claim, explaining that the value of a parcel of realty depends not only on its intrinsic worth, but also upon its location relative to other realty (R. 10085).

**D. The Commission's Readjustment Properly  
Considered All Three Generating Units**

The license issued to Montana in 1930 authorized construction of its first two generating units, which commenced operation in 1939 and 1949, respectively. The third generating unit was added in 1954, though the authorization of these project works was not made until 1961. Montana contends (Br. pp. 52-55) that no readjustment of the charges with respect to the third unit can become effective until 1974, i.e., until 20 years after operation of the third unit began. It bases its claim on the Third Unit case where this Court agreed with the Commission that it could require additional annual charges for their third unit when it amended the license to authorize the additional project works. *Montana Power Co. v. F.P.C.*, 112 AppDC at 11, 298 F. 2d at 339.

Both the examiner and the Commission properly rejected the contention. Section 10(e) of the Act, *infra*, p. 48, provides for readjustment of annual charges "at the end of twenty years after the *project* is available for service \* \* \*." (Emphasis supplied.) "Project" is, in pertinent part, defined as a "complete unit of improvement, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including naviga-

tion structures) which are a part of said unit \* \* \*." Section 3(11), *infra*, p. 45.<sup>34</sup> "Project works," on the other hand, means "the physical structures of a project." Section 3(12), *infra*, p. 45. Section 4(e) of the Act empowers the Commission to license the construction, operation and maintenance of water power "project works". And as in this instance, all the project works for a project, *i.e.*, the complete unit of improvement, are not necessarily licensed at one time.

This result is in no way inconsistent with the approval in the Third Unit case for additional charges for the use of the Indian lands by the newly licensed project works, *i.e.*, the third unit. For the statute provides that whenever the licensing authority is invoked—as it must be to construct previously unauthorized project works—a reasonable annual charge may be fixed for the use of tribal lands. But the permissible readjustment of those charges is pegged to the time the *project* is available for service, not to the availability date of particular project works.

This construction fully comports with the scheme of the Act. New construction can, of course, be undertaken only with specific approval by the Commission to assure that it is consistent with the most comprehensive development of the nation's waterways. See Section 10(a). However, the assessment of charges for project works not yet approved or applied for is neither feasible nor reasonable. Hence, charges are only imposed for project works as they are licensed. On the other hand, once constructed, all the elements of a project are in fact part of a single unit. For example, under Section 14 it is the project, not the project works, that is subject to recapture. Separate

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<sup>34</sup> Article 2 of the Kerr Project license states that the "project" covered by the license "consists of", *inter alia*, the project works that are specifically enumerated or referred to in that article (R. 8868-8869). Each time project works have been added or deleted, Article 2 has been amended to reflect the change. When the third unit was authorized the license was amended to show that the new project works were part of the "project" covered by the license (R. 9343).

treatment of the components after construction would make no sense.<sup>35</sup>

### III. The Readjusted Charges Were Properly Assessed as of May 20, 1959

In determining that the adjusted charges should be made effective as of May 20, 1959, the Commission was exercising its discretion in consonance with the provisions of Article 30(D) of the license authorizing readjustment "at the end of 20 years after the beginning of operations under the license" and Section 10(e) of the Act authorizing readjustments "at the end of twenty years after the project is available for service \* \* \*." Service commenced on May 20, 1939.

Montana contends that an adjustment cannot lawfully be made effective retroactively to the end of the 20-year period but can take effect only prospectively after the Commission, subsequent to a full hearing if the licensee so demands, reaches its new determination. It relies for support of this bizarre claim primarily upon the phraseology of the schedule of payments as set forth in Article 30(A)(3) of the original license. That schedule, after listing the payments prior to the commencement of the 16th year, states: "For the next five years [*i.e.*, the 16th through the 20th year of operations] and/or until re-adjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of paragraph (D) of this article 30 \* \* \*." (R. 8878).

The claim is that this language indicates that only re-adjusted payments prospective from the Commission's decision were intended in the license. This argument is nonsense in its own terms: the far more reasonable reading of the language is only that during any period, after

<sup>35</sup> Cf., *Arkansas Power & Light Co.*, 26 FPC 549 (1961), in which the Commission denied an application to amend a license because the petitioner sought to distinguish between parts of the same project. It had requested the establishment of different dates for the commencement of the amortization reserve period required in Section 10(d) for different project works within the same project.

the twentieth year, in which readjustment proceedings were in progress payments should continue to be made at the previous level, rather than being suspended pending finalization of the new award. But in any event it is the language of Section 10(e) of the Act, not any terms of the license,<sup>36</sup> which necessarily is controlling as to when readjustments are to be effective and the language of Section 10(e) of the Act supports no such limitation.

Literal interpretation of the statutory provision that readjustment may be made "at the end" of the 20-year period might be that the readjustment must be made precisely "at the end" of the 20-year period. This would make no sense. The readjustment procedures cannot reasonably be expected to commence much prior to the expiration of the statutory period for reasonably current facts must be available for consideration in the readjustment process. In addition, such proceedings necessarily involve considerations of numerous factors and cannot be disposed of *instantly*,<sup>37</sup> particularly since readjustment may only be ordered upon notice and opportunity for hearing. Section 10(e), *infra*, p. 48. Accordingly, readjustment "at the end" of the 20-year period must mean effective at that time. For to delay indefinitely the effectiveness of a revision in payments would defeat the clear legislative purpose of providing reasonable compensation for the use of the tribal lands and would place a premium on dilatory action by the party resisting change. As the Commission stated (R. 10070):

It would be grossly inequitable to allow a tenant to occupy premises during a dispute over the establishment of a fair and reasonable rental charge if

---

<sup>36</sup> If any license Article were relevant (and we repeat none is) it would be Section 30(D) which directly provides for readjustment (R. 8879). But nothing therein suggests a readjustment determination not completed before the commencement of the twentieth year of project operation can only be put into effect prospectively.

<sup>37</sup> It might be noted that this proceeding was initiated by petition filed by the Tribes in May 1959.

such charge were not effective during the full period of the dispute. The owner is entitled to his proper rental for the period of occupancy although the final determination as to the proper amount may not be reached until long afterward.<sup>[38]</sup>

Nor do we think that the retroactive application of readjusted charges is unfairly prejudicial to Montana in the circumstances of this proceeding. Montana argues (Br. p. 59) that it could not possibly have justified the creation of reserves beginning in 1959 in anticipation of a possible increase. The argument is without merit. The Tribes' rights to proper payment for the utilization of their lands and to a readjustment after twenty years of project operation cannot depend on whether the company chose to set aside a special contingency reserve of adequate size to cover the additional payments. Moreover, Montana was apprised of the petition filed by the Tribes on May 19, 1959, upon the expiration of the 20-year period, and could, if it so desired, have taken precautionary steps to provide for the possibility of a readjustment. Its neglect to do so can hardly be translated into an abuse of discretion on the part of the Commission.<sup>39</sup>

#### IV. The Commission Properly Exercised Its Discretion In Imposing Interest Retroactively on the Readjusted Charges at a 6 Percent Rate

For its final point, Montana contends (Br. pp. 61-63) that the imposition of interest on the readjusted charges is without legal basis or, if permitted at all, should not have been ordered at a rate in excess of 4 percent per annum.

<sup>38</sup> The interpretation urged might well be violative of the Tribes' basic constitutional rights. To carry Montana's argument to its logical conclusion, delay in pending proceedings to the date of expiration of a license would render the proceeding moot and deprive the owners of the lands of reasonable compensation for the use of their property.

<sup>39</sup> Moreover, as the examiner points out (R. 9722), the company had very substantial earnings during the periods involved and is in no manner disabled from making the payments ordered.



While this Court in *Montana Power Company v. F.P.C.*, *supra*, p. 4, affirmed the Commission's order imposing interest (25 FPC 221, 224), the company first argues that the policy reflected by judicial precedent and relevant state statutes prohibits the allowance of interest on unliquidated rental charge amounts, at least until they have been fixed by Commission decision.<sup>40</sup>

Authority to impose interest charges retroactively is not dependent on an express statutory grant but has its foundation in the principle of recompense to the persons who are deprived of the use of the monies to which they are entitled by those who enjoyed it, *i.e.*, Montana which in this case has had the use of the difference between the original payment and the readjusted charge since 1959. *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 230 (1965); *Texaco, Inc. v. F.P.C.*, 290 F. 2d 149, 157 (CA 5, 1961). It does not depend on any concept of Montana as a wrongdoer but rather serves to avoid a result amounting to unjust enrichment. *Texaco, Inc. v. F.P.C.*, 290 F. 2d at 157. The Commission's order in this respect is analogous to N.L.R.B. back pay orders, with interest, which have been uniformly sustained by courts of appeal based on the same rationale. *Philip Carrey Manufacturing Co. v. N.L.R.B.*, 331 F. 2d 720, 731 (CA 6), certiorari denied, 379 U.S. 888 (1964); *International Brotherhood of Operative Potters v. N.L.R.B.*, 116 AppDC 35, 320 F. 2d 757, 760-761 (1963); *Reserve Supply Corp. v. N.L.R.B.*, 317 F. 2d 785, 789 (CA 2, 1963).

Nor did the Commission abuse its discretion in fixing the interest rate at 6 percent because the statutory rate applicable to rentals for Indian lands remaining on deposit in the U.S. Treasury under 45 Stat. 200, 213, is 4 percent. The monies deposited with the Treasury are for

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<sup>40</sup> Contrary to the company's contention, the tendency of modern authority is to disregard the distinction between liquidated and unliquidated claims. Departures from the stated principle to this effect which prevailed earlier are stated to be so numerous as to subordinate it to the principle that full compensation should be awarded for a loss sustained. See 47 C.J.S., *Interest*, § 19.



the benefit of the Tribe and its members and may be withdrawn and devoted to other productive purposes at the option of the Tribes. The money retained by Montana but owed to the Indians was not theirs to utilize. The fact that a person owed sums at interest of 6 percent might have chosen to reinvest it at 4 percent if he had had the funds (or had put it in a mattress, for that matter) does not justify reducing the rate of interest owed.

Discretion as to the rate to be imposed is, in the absence of statute, one to be exercised by the Commission according to its own criteria. Cf., *Royal Indemnity Co. v. United States*, 313 U.S. 289, 296 (1941). The Commission has in numerous cases during the period here in question imposed 6 percent interest charges retroactively for nonpayment of amounts found to be due. E.g., see *Mississippi River Fuel Corporation v. F.P.C.*, 108 App DC 284, 292, 281 F. 2d 919, 927 (1960), certiorari denied, 365 U.S. 827 (1961); *United Gas Improvement Co. v. Callery Properties, Inc.*, *supra*; *Texaco, Inc. v. F.P.C.*, *supra*; *Wisconsin-Michigan Power Co.*, 31 FPC 1445, 1462 (1964). Its determination (R. 10071) that perpetuation of an unrealistically low rate previously applied would be inequitable and its use instead of the prevailing commercial rate constituted a reasonable exercise of discretion.

CONCLUSION

For these reasons, the order of the Commission should be affirmed.

Respectfully submitted,

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September 1968

## APPENDIX

The Federal Power Act, as amended, 16 USC 791a *et seq.* in pertinent part provides:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

\* \* \* \*

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

\* \* \* \*

SEC. 4. The Commission is hereby authorized and empowered—

\* \* \* \*

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other

bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: \* \* \*

*Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. \* \* \*

\* \* \* \*

SEC. 6. Licenses under this Part shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this Part and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 3743, Revised Statutes, as amended.

\* \* \* \*

SEC. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judg-

ment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

\* \* \* \*

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands

embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

12 (f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse

the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.\*

\* \* \* \*

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\* Section 10(e) and (f) as originally enacted in 1920 (41 Stat. 1069-1070) read as follows:

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: *Provided*, That when licenses are issued involving the use of



SEC. 13. That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary

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Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license: *Provided*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining or other beneficial use in projects of not more than one hundred horsepower capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the commission.

b L (f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the commission.

Whenever such reservoir or other improvement is constructed by the United States the commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof.

SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at

the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

\* \* \* \*

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this

section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

\* \* \* \*

SEC. 28. That the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder.

\* \* \* \*

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.



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BRIEF FOR THE SECRETARY OF THE INTERIOR,  
INTERVENOR

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21904

THE MONTANA POWER COMPANY, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent

THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA,

STEWART L. UDALL, SECRETARY OF THE INTERIOR,  
Intervenors

---

ON PETITION TO REVIEW ORDERS OF THE  
FEDERAL POWER COMMISSION

---

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21904

THE MONTANA POWER COMPANY, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent  
THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA,  
STEWART L. UDALL, SECRETARY OF THE INTERIOR,  
Intervenors

---

ON PETITION TO REVIEW ORDERS OF THE  
FEDERAL POWER COMMISSION

---

BRIEF FOR THE SECRETARY OF THE INTERIOR,  
INTERVENOR

---

OPINION BELOW

The opinion of the Federal Power Commission issued October 4, 1967, is found at page 10056 of the record. The order denying applications for rehearing is found at R. 10157.

JURISDICTION

The order denying the timely applications for rehearing was issued on March 21, 1968. Petitioner, Montana Power Company, filed its petition for review on May 6, 1968. This Court has jurisdiction to review orders of the Federal Power Commission under Section 313 of the Federal Power Act, 49 Stat. 860, as amended, 16 U.S.C. sec. 825(1).

### ISSUES PRESENTED

1. Whether the Federal Power Commission, under Section 10(e) of the Federal Power Act as amended in 1935, has authority to readjust at the end of 20 years the annual charge for use of Indian tribal lands in a license issued before the statute was amended.

2. Whether the Court, reviewing under Section 313(b) of the Federal Power Act an order of the Federal Power Commission, should reweigh the testimony of the expert witnesses on the proper method of determining the readjusted annual charge, or reverse the Commission's interpretation of Section 10(e) of the Act.

Although a different case, litigation involving the same project and parties was before this Court in Montana Power Company v. Federal Power Commission, 112 U.S.App.D.C. 7, 298 F.2d 335 (1962).

### STATEMENT

This case arises from a petition by the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (Tribes) to readjust the annual charge paid by Montana Power Company (Montana Power) for the use of tribal lands in the Kerr Hydroelectric Development, Federal Power Commission License, Project No. 5. Both Article 30(D) of the license (R. 8879) and Section 10(e), of the Federal Power Act, 41 Stat. 1069, as amended,



16 U.S.C. sec. 803(e), provide that annual charges involving tribal lands may be readjusted at the end of 20 years after the project is available for service. The Secretary of the Interior was allowed to intervene on behalf of the Tribes. After extensive proceedings before the Federal Power Commission, Presiding Examiner Williams entered his initial decision on August 4, 1966. Exceptions to the Examiner's decision were filed by all parties (R. 9758-9889). After proceedings before the Commission on the exceptions, the order of October 4, 1967, revising the findings of the Examiner, was issued (R. 10087). Montana Power and the Tribes made applications for rehearing which were denied on March 21, 1968 (R. 10157). Petitions for review of the F.P.C. were filed thereafter in this Court by the Tribes (No. 21767) and Montana Power (No. 21904). The Secretary of the Interior was allowed to intervene on behalf of the Tribes in No. 21904 by this Court's order of September 9, 1968.

The license for Project No. 5 was issued to a subsidiary of Montana Power on May 23, 1930. Section 10(e) of the Federal Water Power Act, 41 Stat. 1069, provided that for license involving the use of tribal lands "\* \* \* the commission shall fix a reasonable annual charge \* \* \*" which may be readjusted at the end of 20 years "in a manner to be described in each license: \* \* \*." Pursuant to this statute, the license contained Article 30(D) as follows (R. 8879):

(D) : The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operation under this license and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission, and the Secretary of the Interior can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in "The United States Arbitration Act," (U.S.C., Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development.

After Montana Power fell into default on the construction of the project as scheduled in the original license and the matter was referred to the Attorney General for appropriate action, a curative amendment was entered into on July 17, 1936. See Amendment No. 2, R. 9043. In the meantime, on August 26, 1935, the Federal Water Power Act had been redesignated the Federal Power Act and Section 10(e) amended to provide in pertinent part (49 Stat. 843):

\* \* \* Provided, That when licenses are issued involving the use of \* \* \* tribal lands embraced within Indian reservations the Commission shall, \* \* \* subject to the approval of the Indian tribe having jurisdiction of such lands \* \* \* fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service  
\* \* \* . 1/

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1/ Emphasis added throughout this brief.

On May 20, 1939, the first unit of the project was completed and began commercial operations (R. 10060). A second unit of the project became operational in 1949, and a third unit in 1954. The decision determining the annual charge for the third unit was affirmed by this Court in Montana Power Company v. Federal Power Commission, 112 U.S.App.D.C. 7, 298 F.2d 335 (1962).

The Tribes filed their petition in the present case for readjustment of the annual charge in May 1959. Extensive hearings were held in October and November 1965, before an examiner of the F.P.C. at which the Tribes, the Secretary of the Interior, Montana Power and the F.P.C. presented expert testimony on readjustment of the annual charges. After briefing and oral argument, the examiner made his initial decision (R. 9712). The examiner summarized his findings as follows (R. 9714):

Upon the basis of the entire record in this proceeding, including the briefs and arguments of the parties, the Examiner finds as follows: first, the Commission has jurisdiction of the cause under Section 10(e) of the Federal Power Act, as amended; second, April 30, 1959, marks the expiration of the initial twenty-year period of commercial operation of Project No. 5; third, the readjustment of charges, including those of the third unit of the Kerr installation, is properly within the ambit of this proceeding; and fourth, the annual charges for the occupancy and use of the tribal lands should be readjusted to the sum of \$850,000 a year for the ten-year period beginning May 1, 1959, the said payments to be retroactive to such date. The annual charges already paid by the Company pursuant to

Article 30(A) of the license during the retro-active period shall first be deducted from the readjusted charges and the remaining cumulative balances shall bear 4 percent simple interest per annum as was allowed in the earlier Third Unit proceeding (22 FPC 502, 523).

All three parties filed exceptions to the examiner's decision, and after further briefing and argument, the commission issued its opinion and order of October 4, 1967, which it summarized as follows (R. 10060):

We hold that: (1) The Commission has jurisdiction under Section 10(e) of the Act to readjust annual charges; (2) the project was available for and began commercial operations on May 20, 1939; (3) the readjusted annual charges should be effective 20 years from May 20, 1959; <sup>2/</sup> (4) the readjustment should include the third unit of the current installation; (5) the readjusted annual charge is \$950,000 with simple interest at 6 percent.

Commissioner Carver filed a concurring opinion in which he expressed the view that the commission should have ruled on an argument asserted by the Secretary of the Interior " \* \* \* that there inhered in the Secretary the right to reject a determination made by this Commission in these proceedings, in other words to 'veto' it" (R. 10088).

By letter of November 3, 1967, the Secretary of the Interior accepted the order of October 4, 1967 (R. 10099). Applications for rehearing were filed by both Montana Power and

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<sup>2/</sup> This is a typographical error. The order at the end of the opinion makes clear the readjusted annual charge "shall be effective as of May 20, 1959" (R. 10087).

the Tribes. The Tribes alleged it was error for the Commission to fail to take into consideration income accruing to Montana Power by reason of downstream releases (the so-called "headwater benefits") in readjusting the annual charge. Montana Power challenged jurisdiction of the F.P.C. and alleged error in (1) readjusting annual charges effective May 20, 1959; (2) requiring interest payments at 6% retroactive to May 20, 1959; (3) including the third unit in the readjustment; (4) and utilizing the profitability method as the basis for determining annual rental.

The F.P.C. denied both applications in its order of March 21, 1968, holding (R. 10158):

Both the Tribes and Montana improperly assume that the Commission's determination was based exclusively on the profitability method of Van Scoyoc and the allocation factor of Sporseen. This was not the case. The Commission's decision was based on the record as a whole, including the role of the Kerr project as a significant element in Montana's system and a major contributor to its earning power. The decision did use the profitability method as a guide in arriving at its end result, noting at the same time that a proper application of the net benefits method would have produced approximately the same result. In so doing, the Commission noted that the profitability method more closely conforms to the Commission's regulations on this subject.

Contrary to Montana's assertion, we have not decided the question whether our determination is subject to the approval of the Secretary of Interior. Since the Secretary has accepted the Commission's determination of this proceeding, the issue is not presented in this case.

Commissioner Carver filed a dissent, insisting that there should have been a ruling on the question of the Secretary's authority to disapprove the readjustment of the annual charge by the F.P.C. Petitions to review the F.P.C. were subsequently filed in this Court by Montana Power and the Tribes.

#### SUMMARY OF ARGUMENT

##### I

The F.P.C. properly assumed jurisdiction of this case under Section 10(e) of the Federal Power Act.

A. Congress intended that F.P.C. be the agency to readjust annual charges. Montana Power argues that F.P.C. should not have taken jurisdiction over this proceeding but should have deferred to an arbitration proceeding under Article 30(D) of the License. This older method was provided because Section 10(e) of the Federal Water Power Act in effect at the time the license was issued required that each license describe the manner of readjustment. Section 10(e) was amended in 1935 to require that F.P.C. readjust the annual charges. Both the plain language of the statute and the interpretation of the administering agency, which is entitled to deference, require F.P.C. jurisdiction. Sections 6 and 28 of the Federal Water Power Act do not prevent amended Section 10(e) from being effective. These sections prevent Congress only from changes which involve substantial rights. Both the Commission and the courts take the view that changes made by



Congress in the Federal Power Act which do not affect substantive rights are effective against prior licensees without renegotiating all outstanding licenses. Moreover, the legislative history of the 1935 Section 10(e) amendment shows that it was the intent of Congress that F.P.C. have jurisdiction over readjustment of annual charges, and the belief of Congress that the F.P.C. already possessed that authority. If no amendment of the Federal Power Act, procedural or substantive, can affect any outstanding license, as Montana Power argues, then the present license has been in default since 1935. Moreover, Amendment No. 2 to the license shows that Montana Power accepted the 1935 amendment to Section 10(e).

B. The 1935 amendment of Section 10(e) is not unconstitutional. Montana Power argues that, if Congress intended by the 1935 amendment to give the F.P.C. jurisdiction, that statute is unconstitutional. The argument is based on two cases applying the distinction between "procedural" and "substantive" matters in diversity cases. They are not relevant to any issue in this case. Numerous Supreme Court cases clearly indicate that Congress has the authority to make the change from arbitration to F.P.C., regardless of whether the change be viewed as procedural or substantive.

C. The Secretary claims no authority to overrule a judgment of this Court. In a somewhat unclear argument, Montana



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C. The Secretary claims no authority to overrule a judgment of this Court. In a somewhat unclear argument, Montana

Power leaves the impression that the Secretary's statutory authority to approve any readjustment of annual charges by the F.P.C. would make a judgment of this Court on review nonfinal, and therefore destroy the jurisdiction of this Court. Since the Secretary has already approved F.P.C.'s determination, the holding of the Commission that the issue is moot in this case is correct. Moreover, the judgment of this Court on review of the proceedings before the F.P.C. under Section 313(b) of the Federal Power Act is as final and binding on the Secretary of the Interior as any other interested party.

## II

The decision of the F.P.C. on the other issues in the case should be affirmed as reasonable, supported by substantial evidence in the record and not plainly wrong as a matter of law. There is a presumption of validity of administrative action, and this Court will uphold any discretionary action of the Commission which has a rational basis and is not beyond its statutory authority.

A. The method chosen by the F.P.C. from among the conflicting theories of experts on the proper method of readjustment of the annual charges was supported by substantial expert evidence. The major complaint of Montana Power on the merits is that the Commission adopted the wrong method of readjusting the annual charge. The Commission, having before it the testimony of several

experts on valuation of power sites, rejected the approach of Montana Power's experts and chose a combination of methods supported by other experts. F.P.C.'s choice, being supported by substantial expert testimony, should not be overturned on review.

B. The Commission correctly interpreted the meaning of "readjusted" as used in Section 10(e) of the Federal Power Act. It held that fairness to all parties required that the readjustment proceed from an entire analysis de novo, rather than considering individual factors in isolation. The meaning of terms in a statute is a matter for the administering agency initially, and the reviewing court will not reject any reasonable interpretation.

C. The third unit was part of the "project" licensed in 1930 and therefore properly considered in the readjustment. The first unit of the project became available in 1939, the second in 1949 and the third in 1954. The F.P.C. held the statute requires readjustment 20 years after the "project" becomes available for service, instead of the date which any individual unit, a "project works," becomes available. This is a reasonable construction of the Act and should be affirmed.

D. The Commission correctly interpreted Section 10(e) to require the readjusted annual charge to be retroactive to the expiration of the 20-year period. Otherwise, the delays of litigation can be used to defeat the intent of the statute that the

annual charges be readjusted after 20 years. The allowance of interest was proper as the means to compensate the Tribes for the delay of money due at an earlier date and paid at a later date. The choice of a proper interest rate is for the F.P.C. and should be affirmed unless unreasonable.

#### ARGUMENT

##### I

#### THE F.P.C. PROPERLY ASSUMED JURIS- DICTION OF THIS CASE UNDER SECTION 10(e) OF THE FEDERAL POWER ACT

A. Congress intended that F.P.C. be the agency to re-adjust annual charges. - The principal point which Montana Power raises in its brief is that the F.P.C. should not have taken jurisdiction over this proceeding to readjust the annual charge payable to the Tribes, but should have deferred to an arbitration proceeding contemplated under Article 30(D) of the License. This older method of readjusting the annual charge was provided because the Federal Water Power Act in force at the time the license was issued required that "the commission shall fix a reasonable annual charge for the use [of tribal lands], and such charges may be readjusted at the end of twenty years after the beginning of operations \* \* \* in a manner to be described in each license: \* \* \*." Section 10(e), Federal Water Power Act, 41 Stat. 1069.

The procedure whereby each license could specify the manner in which annual charges were to be readjusted was amended

by Congress in 1935 to require that the F.P.C. readjust the annual charges. As amended, Section 10(e) now provides (49 Stat. 843, 16 U.S.C. sec. 803(e)):

\* \* \* That when licenses are issued involving the use of \* \* \* tribal lands embraced within Indian reservations the Commission shall, \* \* \* subject to the approval of the Indian tribe having jurisdiction of such lands \* \* \* fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service \* \* \*.

Therefore the controlling statute expressly requires that the F.P.C. shall fix and readjust the annual charges. The F.P.C., the agency charged with the administration of this statute, has interpreted it as requiring the exercise of F.P.C. jurisdiction over the present readjustment proceedings. We have then in support of jurisdiction both the plain language of the statute and the interpretation of the agency charged with its administration, an interpretation to which the courts show "great deference."

Udall v. Tallman, 380 U.S. 1, 16 (1965); Unemployment Comm'n v. Aragon, 329 U.S. 143, 153 (1946); California Company v. Udall, 111 U.S.App.D.C. 262, 266, 296 F.2d 384, 388 (1961); Mississippi Valley Gas Co. v. Federal Power Commission, 294 F.2d 588, 592 (C.A. 5, 1961); Amerada Petroleum Corp. v. Federal Power Com'n, 293 F.2d 572, 575 (C.A. 10, 1961), cert. den., 368 U.S. 976.

Montana Power points to the provision for arbitration in Article 30(D) of the license. It is argued that this was in

existence before the 1935 amendment of Section 10(e), and that Sections 6 and 28 of the Federal Water Power Act, 41 Stat. 1067, 1077, in effect when the license was issued, prevent amended Section 10(e) from being effective. The decision of the Examiner, which was in this respect affirmed by the Commission, correctly held that the position of Montana Power "must be rejected for a number of compelling reasons" (R. 9716). Both the Examiner and the Commission take the view that Sections 6 and 28 exempt only substantive rights from subsequent changes in the Federal Power Act. Changes made by Congress in the Federal Power Act which do not affect substantive rights are effective against prior licensees without renegotiating all outstanding licenses. This is the view taken by the Third Circuit in Pennsylvania Power & Light Company v. Federal Power Com'n, 139 F.2d 445, 453 (C.A. 3, 1943), cert. den., 321 U.S. 798; and Safe Harbor Water Corp. v. Federal Power Com'n, 179 F.2d 179, 185 fn. 10 (C.A. 3, 1949), cert. den., 339 U.S. 957.

Montana Power's argument (Br. 21 et seq.) that Congress did not intend by the 1935 amendment of Section 10(e) to allow the F.P.C. to determine the readjustment is contradicted both by the express provisions of amended Section 10(e) which clearly show that Congress was providing a procedure requiring F.P.C. to readjust the annual charge, and by the legislative history explaining the amendment. The House Report states (H. Rept. No. 1318, 74th Cong., 1st sess., p. 24, Cong. Doc. Ser. No. 9888):



"\* \* \* The Commission's authority to adjust all charges from time to time is made express. It is also made clear that the adjustment of charges for licenses involving the use of Government lands shall be made 'by the Commission' \* \* \*." Indeed, it would appear from this that Congress did not believe it was giving the F.P.C. any new power to make adjustment of annual charges, but was merely making express what had always been inherent in the statute.

The reliance of Montana Power on Section 28 of the Federal Water Power Act, Act of June 10, 1920, 41 Stat. 1077, to rebut the plain language of the 1935 amendment to Section 10(e), is misplaced. When Congress stated in the 1920 Act that "no \* \* \* amendment \* \* \* shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder," the reference was obviously to substantial rights, and not mere matters of form or procedure. To give these words their exact, literal meaning, as Montana Power argues, without any deviation, would not only lead to absurd results, but would make this very license to have been in a continuing state of default since the 1930's.

This is so because the original license issued in 1930 was in default until it was revived by amendment dated July 17, 1936 (R. 9043). The authority to "modify, alter, enlarge or omit" any of the conditions of the original license pursuant to

Article 41 was given to "the Commission." (R. 8884.) At the time of the original license, "the Commission" was composed of the Secretary of War, the Secretary of the Interior,<sup>3/</sup> and the Secretary of Agriculture. Sec. 1, Federal Water Power Act, 41 Stat. 1063. It was only after the issuance of the license for Project No. 5 that the F.P.C. was changed to the membership which issued the orders authorizing the reviving amendment of July 1936 and all subsequent amendments. Since, under Montana Power's argument, Congress either could not or did not authorize any procedural changes applicable to its license, it follows that the only "Commission" which could have amended the original license was not in existence at the time the amendments were issued. In fact, Montana Power has accepted the benefits of the amendments of the Federal Water Power Act subsequent to the issuance of its license on May 23, 1930, not only in the acceptance of the amendments to the license by another "Commission" but in many other ways.

Moreover, Montana Power has accepted the 1935 amendment of Section 10(e). The chief evidence of this is the reviving

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<sup>3/</sup> The fact that the Secretary of the Interior was a member of the F.P.C. at the time the license was issued would have been a reason for the use of arbitration. The Secretary had conflicting roles as a member of the Commission and the government officer charged with protecting the interests of the Indians. Section 1 of the Federal Water Power Act was amended by the Act of June 23, 1930, 46 Stat. 797, to eliminate the Secretary as a member of the F.P.C.

amendment of the license in July 1936. While the amendment stated that it "shall not operate to alter or amend said license in any other respect than as herein specified" (R. 9047), the acceptance of the amendment by Montana Power is couched in these terms (R. 9055):

IN TESTIMONY OF ACCEPTANCE of all the terms and conditions of the foregoing instrument and of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended, the Licensee, this 30th day of June, 1936, has caused these presents to be signed \* \* \*.

Another fact to show that Montana Power and other parties to the license were dealing with the Federal Power Act as it existed in 1936 are the provisions in amendment No. 2 relating to the Indian tribes. By the 1935 amendment to Section 10(e) of the Federal Power Act, the authority of the F.P.C. to set the annual charge was for the first time made "in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands \* \* \*." 49 Stat. 843. Accordingly, the recitals in amendment No. 2 set out that Montana Power and the Tribes "have executed an agreement and supplementary agreement in writing whereby the aforesaid tribe waives all accrued claims, if any, to damages which it may have by reason of any past violation of the terms of the original license, and has consented to the amendment of the license hereinafter set forth, including the annual charges therein provided for \* \* \*" (R. 9044). Again, the

recital of the Secretary of the Interior's approval of amendment No. 2 specifically states that he was advised "of the consent of said tribe to the amendment of the license as hereinafter set forth including the annual charges therein provided for \* \* \*" (R. 9045). In yet a third place, the recital of the F.P.C.'s findings on amendment No. 2 "upon due consideration" of the agreements with the Tribes found (R. 9046):

(c) That payments in accordance with the schedule proposed in Exhibit A of aforesaid agreement would constitute a reasonable annual charge for the use of the tribal lands involved, if approved by the Indian tribe having jurisdiction over such lands \* \* \*

The F.P.C.'s findings are, of course, clearly a paraphrase of the statutory language of Section 10(e) after the 1935 amendment.

It is submitted that the record shown in this case makes clear, first that Congress intended the F.P.C. to have jurisdiction of proceedings to readjust annual charges; second, this being a procedural matter, it was applicable to pre-existing licenses without violating Section 28 of the Federal Water Power Act; and third, in any event, Montana Power clearly accepted the 1935 amendment of Section 10(e) of the Federal Power Act when it accepted amendment No. 2 in July 1936 where the parties were obviously dealing with reference to the amended language.

B. The 1935 amendment to Section 10(e) of the Federal Power Act is not unconstitutional. - If it were the intent of Congress to make F.P.C. the agency to readjust annual charges under Section 10(e) of the Federal Power Act, as we maintain

above, that disposes of the jurisdictional issue in this case unless it is beyond the power of Congress to make the 1935 amendment. Montana Power argues that if Congress intended by the 1935 amendment of Section 10(e) to give the F.P.C. jurisdiction to readjust annual charges, that statute is unconstitutional (Br. 26 et seq.). This argument is based primarily on two cases, neither of which are remotely relevant to the present case. The cases are Bernhardt Co. v. Polygraphic Co., 350 U.S. 198 (1956); and Robert Lawrence Company v. Devonshire Fabrics, Inc., 271 F.2d 402 (C.A. 2, 1959). Bernhardt holds that for purposes of applying the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), viz., that in diversity cases state law controls matters of substance and federal law controls procedural matters, the enforceability of an arbitration clause in a contract between private parties is "substantive" rather than "procedural." Robert Lawrence holds that an arbitration clause in a contract between private parties in a diversity suit is enforceable, not according to state law but as a substantive federal right created by the Federal Arbitration Act, 9 U.S.C. secs. 1-14, thereby making it unnecessary to decide any substantive-procedural question under Erie Railroad Co.

Congress clearly has constitutional power to grant F.P.C. jurisdiction to readjust annual charges, even if alteration of a contractual obligation is necessary for Congress to

exercise this facet of the Commerce Clause.<sup>4/</sup> El Paso v. Simmons, 379 U.S. 497 (1965); Lichter v. United States, 334 U.S. 742 (1948); Ring Const. Corporation v. Secretary of War of U.S., 85 U.S.App. D.C. 386, 178 F.2d 714 (1949).

Since the Contract Clause of the Constitution, Article I, Sec. 10, is not applicable to the Federal Government, impairment of contracts with the Federal Government are generally attacked under the more general standards of the Fifth Amendment Due Process Clause. See, e.g., Lichter and Ring Const. Corporation, *supra*. If the states, which are subject to the Contract Clause, could have changed the license in the manner involved in this case, *a fortiori*, the Congress of the United States has the power to do so.

There is no doubt that the states could have effected the change made by the 1935 amendment of Section 10(e) of the Federal Power Act. El Paso v. Simmons, 379 U.S. 497 (1965); Veix v. Sixth Ward Association, 310 U.S. 32 (1940); Home Bldg. & L. Assn. v. Blaisdell, 290 U.S. 398 (1934); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437 (1903). Nor is it necessary to argue whether the change was "procedural" or "substantive" or whether

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<sup>4/</sup> Here we are concerned with a "license" as distinguished from a "contract." A license is, of course, merely an authorization to do that which would otherwise be illegal, and not necessarily a contract. Puget Sound Co. v. Seattle, 291 U.S. 619, 627 (1934). Since it is not controlling in this case whether the license be viewed simply as a license, or as a license-contract, it is not necessary to develop the distinction.



it affected the "remedy" or the "obligation." El Paso v. Simmons, supra, at pp. 506-509; Home Bldg. & L. Assn. v. Blaisdell, supra, at pp. 434-439. In El Paso v. Simmons, the Court said (379 U.S. at p. 508):

\* \* \* The Blaisdell opinion, which amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that "[n]ot only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U.S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order \* \* \*."

Further, in Blaisdell, supra, the Court said (290 U.S. at p. 438):

The argument is pressed that in the cases we have cited the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.

The 1935 amendment of Section 10(e), Federal Power Act, was clearly an appropriate exercise by Congress of the Commerce Power as well as its other authorities in the premises such as the control of federal property and over Indian property. Therefore, the constitutionality of the amendment, even if it be construed to impair a contractual obligation, is beyond question.



C. The Secretary claims no authority to overrule a judgment of this Court. - The second phase of Montana Power's jurisdictional argument raises the specter of a grave constitutional issue if the Court does not hold that Montana Power is entitled to arbitration (Br. 30 et seq.). This argument concerns the right of the Secretary to approve any readjustment of the annual charge by the F.P.C. Since Montana Power seriously misrepresents the position of the Secretary, it is necessary to develop the background in some detail. It should be stated at the outset, however, that the Secretary has in fact approved the readjustment of the annual charge in this case (R. 10099). Therefore, the F.P.C. in denying Montana Power's application for rehearing has expressly declined to rule on whether such a right of approval by the Secretary exists because it is not an issue in this case (R. 10158).<sup>5/</sup> Where there is no direct controversy on an asserted legal power the courts will not examine questions which might in some other context raise a constitutional question. Euclid v. Ambler Co., 272 U.S. 365, 395 (1926).

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<sup>5/</sup> As a practical matter, the Secretary's approval power is a very limited one in any event. If the Secretary disapproves of the readjusted rate, the old one continues in effect. Therefore, it would be in the Indians' interest for the Secretary to disapprove only in the unlikely event the readjusted charge is less than the current one.

The basis of the Secretary's contention that he has a right to approve the readjusted annual charge is found in several statutes. The original authorization to build a hydroelectric project on the Flathead Reservation, Act of March 7, 1928, 45 Stat. 212-213, provided:

That the Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use, for the development of power, of power sites on the Flathead Reservation \* \* \*.

Section 4(d) of the Federal Water Power Act, 41 Stat. 1065, <sup>6/</sup> provided that licenses for government reservations "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary \* \* \*." Article 41 of the license provides "that any such change in the terms of this license that may affect the interests of the Flathead Indians shall also be subject to approval by the Secretary of the Interior" (R. 8884). Finally, the Indians themselves under amended Section 10(e) have the right of approval of any readjustment of the annual charges. The Secretary's broad statutory responsibility to act in protection of the interests of the Indians is well recognized. Udall v. Littell, 125 U.S.App.D.C. 89, 93, 366 F.2d 668, 672 et seq. (1966), cert.

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<sup>6/</sup> Now found in Section 4(e) of the Federal Power Act, 49 Stat. 840, 16 U.S.C. sec. 797(e).

den., 385 U.S. 1007, reh. den., 386 U.S. 939. Moreover, the necessity for the Secretary's approval of matters affecting the Tribes is shown by the practice of having the Secretary approve the original license and such amendments to the license as affect the Tribes (R. 8885, 9054, 9074, 9097, 9109, 9115). This Court recognized the Secretary's approval authority on matters affecting the Tribes in Montana Power Company v. Federal Power Commission, 112 U.S.App.D.C. 7, 10, 298 F.2d 335, 338 fn. 2 (1962).

It is unclear precisely what legal issue Montana Power is seeking to raise in this section (Part 1B) of its brief. At the outset, Montana Power castigates the F.P.C. for refusing to "challenge the assertion of the Secretary" that he has an approval authority (Br. 31). At the end of its argument, Montana Power asserts that "the Commission is not vested with power to determine whether or not he has the veto power he claims" (Br. 34). Nonetheless, Montana Power continues that "There is the greatest doubt that the jurisdiction of this Court could be sustained were the reading of the statutory scheme by the majority of the Commission and by the Secretary to be accepted" (Br. 31-32).

Montana Power appears to be contending that if this Court affirms the F.P.C.'s assertion of jurisdiction it will destroy the Court's jurisdiction.<sup>7/</sup> This contention is based on

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<sup>7/</sup> Montana Power must assume in making this argument that the Secretary has authority to approve the readjustment of annual charges if made by the F.P.C. but not if made by arbitration. This is wrong and for this reason if no other the whole argument must collapse. The statutory and license provisions cited above giving the Secretary approval authority are broader than either the Article 30(D) of the license or amended Section 10(e) of the Federal Power Act. They would cover readjustment by arbitration proceeding as much as by the F.P.C.

the proposition that constitutional courts do not render advisory opinions, and will not render judgments which are not conclusive on the parties or are subject to later alteration by administrative action. C. & S. Air Lines v. Waterman Corp., 333 U.S. 103, 113-114 (1948). While the case relied on is clearly distinguishable from the present case, we need not pursue the distinction. The complete answer to Montana Power's argument is that the Secretary does not claim, indeed expressly disavows, any authority to overrule a judgment of this Court on review of the F.P.C.'s order in this case.<sup>8/</sup> The judgment of this Court on review of the proceedings before the F.P.C. under Section 313(b) of the Federal Power Act, 49 Stat. 860, 16 U.S.C. sec. 8251, is as final and binding on the Secretary of the Interior as any other interested party.

## II

THE DECISION OF THE F.P.C. ON THE OTHER ISSUES  
IN THE CASE SHOULD BE AFFIRMED AS REASONABLE,  
SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD  
AND NOT PLAINLY WRONG AS A MATTER OF LAW

In the remainder of its brief, pp. 35-63, Montana Power raises a number of issues involving either the weight which the Commission gave conflicting expert testimony, or the exercise of the Commission's administrative discretion and judgment in picking among reasonable alternatives. As this Court has held the

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<sup>8/</sup> Of course, were a case remanded to the F.P.C. after review, the Secretary's right of approval would be co-extensive with any administrative discretion in the F.P.C. to determine another readjusted annual charge.

doctrine underlying review of this type of case "is the well-established proposition that the findings of an administrative agency within the boundaries of its statutory power, if supported by substantial evidence on the record as a whole, are not to be disturbed by a court." American Trucking Associations, Inc. v. F.C.C., 126 U.S.App.D.C. 236, 249, 377 F.2d 121, 134 (1966), cert. den., 386 U.S. 943; Harper Oil Company v. Federal Power Commission, 284 F.2d 137, 140 (C.A. 10, 1960). There is a presumption of the validity of administrative action, and where there is more than one solution to an administrative problem, the court will uphold any one that has a rational basis and is not beyond the statutory authority of the administrative agency. Udall v. W. V. & M. Coach Co., Inc., \_\_\_ U.S.App.D.C. \_\_\_, \_\_\_ F.2d \_\_\_ (1968). The function of the reviewing court is to lay bare errors of law. F.P.C. v. Idaho Power Co., 344 U.S. 17, 20 (1952). It is not to reweigh the evidence. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 618-621 (1966). Whether the Commission properly adopted and correctly applied any particular method is not the question, but whether the end result is reasonable, as required by statute. Montana Power Company v. Federal Power Commission, 112 U.S.App.D.C. 7, 12, 298 F.2d 335, 340 (1962).

A. The method chosen by the F.P.C. from among the conflicting theories of experts on the proper method of readjusting the annual charge was supported by substantial expert evidence and should be affirmed. - The major complaint which Montana Power makes on the merits is that the Commission adopted the wrong

method in determining the readjusted annual charge (Br. 38-52). This phase of the case is basically an argument by Montana Power that the F.P.C. believed the wrong set of expert witnesses. The determination of readjusted annual charge was accomplished by F.P.C. in two steps: (1) The annual commercial value of the project as a whole was determined (R. 10075-10080). (2) The percentage of the total commercial value which should be allocated to the Tribes was ascertained (R. 10081-10086).

In determining commercial value, the F.P.C. found that the experts pursued two principal techniques, the "net benefits" approach, and the "profitability" method. "Net benefits" bases the value of the site on how much it would cost to produce an equivalent amount of power from the next best alternative source. The saving between the cost of producing the power in this project and the next best alternative source is the net benefit of this site to Montana Power (R. 9725). The "profitability" method bases value for the site on the amount of the company's annual electric revenue attributable to the power generated at this project. From such revenue is deducted the company's annual cost for the production of power at the project and a reasonable return on the net investment at such facility (R. 9725).

The Examiner, after a thorough analysis of the experts presented by Montana Power, found (R. 9727): "[i]n summation, it is evident that the proposals of the Company's witnesses bear little relationship to any realistic determination of the commercial value of the Kerr site." The full Commission affirmed this finding (R. 10077):



Montana Power initially argued for two methods: one based on the Pelton-Round Butte formula, and a second based on the Commission's formula for the determination of reimbursement to the United States for administrative costs. However, the Examiner properly rejected these methods as inapplicable here, and Montana Power has not pursued these arguments. It is therefore unnecessary to treat them further.

The Commission was most impressed with the "profitability" method development by the witness Van Scoyoc (R. 10079).

Montana Power quibbles that the allocation of company earnings to this project under the profitability method is unreasonable, that Van Scoyoc and the Commission were inconsistent in the treatment of headwater benefits collected by the company and those paid by the company, and that the use of the profitability method is contrary to the license and the Federal Power Act. Certainly, the F.P.C. is here dealing in fields where it cannot be said that there is only one proper way to readjust annual charges. The Commission recognized that all methods have their strengths and weaknesses, saying (R. 10078): "There is no one right method - all others being totally wrong. Rather, there is a logic and rationality supporting most of the computations, but also obvious shortcomings." Certainly, Montana Power offers no alternative which is more nearly perfect. The choice of the profitability method, 9/ the allocation of company

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9/ The argument of Montana Power that the parties negotiating the original license intended to exclude the "profitability" method is simply not borne out by the portions of the Scattergood report on which they rely (Br. 38, 47). None of the citations discussed the "profitability" method considered by the F.P.C. in this case.



earnings to this project and the treatment of headwater benefits are all matters where the Commission chose to believe one expert witness rather than another. Van Scoyoc has very impressive qualifications as an expert in valuation of power sites (R. 446-450). This Court should not waste its judicial energies reweighing substantial evidence. See Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966).

Similarly, on the percentage of the total value which should be allocated to the Tribes, the Commission had before it no less than six experts each testifying from one or more different total valuation bases to percentages ranging from 25% to 57.54%. Montana Power argues earnestly why it would have chosen 25% had the initial decision been with it (Br. 49-52). The Secretary of the Interior, had he the power to make the original decision, would have chosen 55.9% (R. 10076). Had the matter been one for judicial determination originally, this Court might have come forward with another choice. But the choice was for the F.P.C., and its choice, based on substantial evidence of the expert witness Sporseen, should not be overturned on review (R. 10081-10086).

B. The Commission correctly interpreted the meaning of "readjusted" as used in Section 10(e) of the Federal Power Act. - Proceeding from its own definition of "readjust," Montana Power argues that when Section 10(e) of the Federal

Power Act grants the F.P.C. the authority to readjust the annual charges, that term "is not a synonym for 'fix anew'" (Br. 36). Therefore, it is said that the F.P.C. erred in this holding (R. 10073-10074):

Montana Power argues that the Commission should be limited to its determination of reasonable annual charges to modifying the annual charges previously determined to reflect any changed circumstances. We do not agree. Nothing in Section 10(e) of the Federal Power Act or in the Kerr license suggests such a limitation. These sources provide two broad standards: one, that the charges be based on the commercial value of the lands for the most profitable purpose; and second, that they be reasonable. In our opinion the reasonable commercial value of the land cannot be determined by considering individual factors in isolation. Instead, in fairness to all parties the entire analysis must be made de novo. This, it should be noted, is the established practice in rate cases followed by this, and most other regulatory agencies.

In the first place, Montana Power is wrong about the dictionary definition of "readjust." According to Webster's New International Dictionary (2d ed. 1939), readjust means "To adjust or settle again or anew."

Second, this is precisely the situation the courts have in mind when they state that "[a]n administrative official charged with the duty of administering a specific statute has a duty to determine as an initial and administrative matter the meanings of terms in that statute," and that the reviewing court will not reject any reasonable interpretation. California Company v. Udall, 111 U.S.App.D.C. 262, 266, 296 F.2d 384, 388

(1961). Finally, Montana Power is misleading in its citation of California Oregon Power Co. v. Federal Power Com'n, 99 U.S.App. D.C. 263, 239 F.2d 426 (1956), as a case "in which the readjustment under Section 10(e) of charges for the use of a government dam was in issue" (Br. 37). The Court held, in fact, in that case that there was no justiciable controversy ripe for judicial review. Considered in context, the dictum quoted by Montana Power is not contrary to F.P.C.'s holding here that the reasonable commercial value of the Indian lands cannot be fairly determined by considering individual factors in isolation, but that in fairness to all parties, the entire analysis must be made de novo.

C. The third unit was part of the "Project" licensed in 1930 and therefore properly considered in the readjustment. - Montana Power maintains that the third unit should not have been considered in this readjustment (Br. 52-55). This argument is that a new "license" was issued for the third unit in 1954, and therefore no readjustment should take place until 20 years from that date. The F.P.C.'s answer is that Section 10(e) provides for readjustment 20 years after the "project" is available for service (R. 10072). What was licensed in 1954 was not a "project," but one of several "project works." As this Court said in Montana Power Company v. Federal Power Commission, 112 U.S.App.D.C. 7, 11, 298 F.2d 335, 339 (1962): "The Commission does not necessarily license all the project works of a given project at one time." Section 3(12) of the Federal Power Act defined "project works" as "the physical structures of a project." The whole project was authorized by the license issued May 23, 1930, as

amended. This project became available for service on May 20, 1939, although the second unit was not put into operation until 1949 and the third unit in 1954. This is an entirely reasonable construction of the Federal Power Act by the administrative agency, and accordingly should be affirmed by this Court.

Thor-Westcliffe Development, Inc. v. Udall, 114 U.S.App.D.C. 252, 254-255, 314 F.2d 257, 259-260 (1963), cert. den., 373 U.S. 951.

D. The Commission correctly interpreted Section 10(e) of the Act to require the readjusted annual charge to be retroactive to the expiration of the 20-year period, and the choice of 6% interest for delayed payments was permissible and reasonable. - Finally, it is the contention of Montana Power that the F.P.C. erred when it made the readjusted annual charge effective as of May 20, 1959, and to bear simple interest at the rate of 6% from that date (Br. 57-63). The position of the F.P.C. is based on the compelling logic that Section 10(e) of the Federal Power Act contemplates readjustment of the annual charges after 20 years, and that to delay the effective date of the readjusted charges until after the litigation would effectively defeat the intent of the statutory provision (R. 10068-10070). One need look no further than the present proceeding, which has now been going on for almost the entire 10-year period during which the readjusted rates were supposed to be effective. As the Commission

points out, to make the readjusted charges effective only at the conclusion of the litigation would be to encourage delay.

On interest, Montana Power makes two contentions: first, that no interest is due, and second, that, if any is due, the rate should be 4%, rather than 6%. Interest is nothing more than the means by which to compensate a person for the delay where money is due at an earlier date and paid at a later date. See Seaboard Air Line Ry. v. United States, 261 U.S. 299, 306 (1923); Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 123 (1924).

The choice of the proper rate of interest is for the F.P.C. and should be affirmed by the reviewing court unless it is unreasonable, just as any other discretionary element of the case. The Commission pointed out that the choice of 6% "is in accord with other holdings of this Commission in closely analogous situations \* \* \*" (R. 10071). The argument that 4% should be the proper rate because that was the interest rate paid by the United States Treasury when these funds were on deposit with it overlooks the fact that such funds are not left on deposit in the Treasury indefinitely. It would be more relevant to argue that the Indians certainly had to pay 6% or more for borrowed funds needed to replace the delayed increase in the annual charge. In any event, this Court may properly affirm the choice of 6% as being a reasonable exercise of the F.P.C.'s statutory authority under Section 10(e) of the Federal Power Act to readjust annual charges.

CONCLUSION

The order of the Federal Power Commission, dated October 4, 1967, is correct and should be affirmed as a valid exercise of the Commission's regulatory power.

Respectfully submitted,

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SEPTEMBER 1968





REPLY BRIEF FOR MONTANA POWER COMPANY,  
PETITIONER-INTERVENOR

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21904

THE MONTANA POWER COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA,

and

THE SECRETARY OF THE INTERIOR, *Intervenors.*

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No. 21767

THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

THE MONTANA POWER COMPANY, *Intervenor.*

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Petitions To Review Orders of the Federal Power Commission

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United States Court of Appeals

for the District of Columbia

Circuit

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THE MONTANA POWER COMPANY, *Intervenor.*

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**Petitions To Review Orders of the Federal Power Commission**

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**REPLY BRIEF FOR MONTANA POWER COMPANY,  
PETITIONER-INTERVENOR**

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This brief is responsive to the briefs filed on September 16, 1968, by the Commission, as respondent, and by the Tribes and the Secretary of the Interior as intervenors. References to these briefs will be (F.P.C., p. —), (Tribes, p. —), and (Secty., p. —), respectively. On occasion, for convenience, these parties may be referred to collectively as "respondents."

In large measure, the arguments advanced in respondents' briefs reflect the justification set out in the Commis-

sion's opinion in support of its conclusions, and have been dealt with in the Company's main brief. While we will avoid repeating what has already been covered, we believe it will serve the convenience of the Court if we organize such further comments as we deem necessary under the captions and in the same order as we dealt with the issues in our main brief.\*

## I

**THE COMMISSION ERRED IN CONCLUDING THAT IT  
HAD JURISDICTION TO FIX A READJUSTED PAYMENT**

## A

**The Statute and the License Deny to the Commission Jurisdiction to Determine the Readjusted Annual Rental**

In the light of respondents' briefs, it is important that the Court have clearly in mind that the issue as to the jurisdiction of the Commission to fix the readjusted payment has two distinct parts. The first part concerns what Congress *did* in 1935. We contend, and have demonstrated in detail in our main brief (pp. 21 *et seq.*) that the 1935 amendment to Section 10(e), which for the first time assigned to the Commission the responsibility for fixing a readjusted rate after 20 years, did not apply to, and was not intended by Congress to apply to, existing licenses and the rights of existing licensees. The express statement to this effect in Section 28, the recognition in the Committee reports that the changes were to apply to licenses "to be issued," and the almost *pro forma* manner in which the 1935 amendments to Section 10(e) were proposed and accepted, all belie an intent by the Congress

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\* Petitioner has discovered that in its working copy of the Record in this case, the pagination of the Commission Opinions, the Initial Decision, and the Scattergood Report is one page ahead of that of the official Record described by the "Certificate of Record in Lieu of Record" filed by the Commission. The numbers used in the citations to those documents in Petitioner's main brief, therefore, should be decreased by one—*e.g.*, "R. 10074" should read "R. 10073." Where, as in most cases, the citation also includes a reference to the page of the document itself (which will appear, in addition to the official pagination, in the printed joint appendix), the references are accurate.

to destroy existing contract rights contrary to its earlier assurance that it would not affect them.

This part of our argument is wholly ignored by the Tribes (Br., pp. 20 *et seq.*), and given only passing attention by the other respondents, despite the fact that if we are correct, there is no need to consider the second part of the issue—*could* Congress have destroyed the Company's contract rights. Because we did not, and do not now, believe that the Court will be required to reach that question, we dealt with it at less length in our main brief, and a further comment here may be appropriate.

Respondents are not consistent in the manner in which they approach this second part of the issue. The Commission (Br., pp. 8 *et seq.*) urges that Congress could change the Company's contract because Section 28 reserved the right to amend the Act, and prohibited only "substantive"—but not "procedural"—changes in existing licenses. The Tribes (Br., pp. 25 *et seq.*) largely ignore the terms of Section 28, and urge that Congress may under the Constitution make changes in "procedure" despite existing contracts. The Secretary (Br., pp. 19 *et seq.*) ignores both the terms of Section 28 and the concept of "procedural" changes, and asserts simply that the Constitution imposes no restraints on the power of Congress to make either substantive or procedural changes in contracts which the United States has entered into.

The Secretary's contention does not require extended discussion. The power of Congress is not so unfettered as the Secretary urges; the extraordinary reach of the war power involved in the cases upon which he relies (*Lichter v. United States*, 334 U.S. 742 (1948); *Ring Construction Corp. v. Secretary of War*, 85 App. D.C. 386, 178 F.2d 714 (1949)) is no precedent for situations such as are here involved. Moreover, it appears to be conceded by the Commission and the Tribes that if the change worked in the contract is deemed to be a "substantive" one, Section 28 itself would come into play, and the issue as to the naked power of Congress would not arise.



This second part of respondents' jurisdictional argument, therefore, appears to rest on two propositions, both of which are essential to their contention: (a) that the right to arbitration in the Company's contract is only a "procedural" right, and (b) that "procedural" rights are not protected by Section 28. We believe that neither proposition can be supported.

(a) The license here involved—the contract among the Company, the Commission and the Secretary\*—provides (Article 30(D)) that in the event of an inability of these parties to agree upon the readjusted annual payment after 20 years of operation, the matter will be settled by arbitration. The argument now made is that a change from that arrangement, under which the decision would be by a neutral person, to an arrangement under which the decision would be made by one of the three parties to the contract, subject only to the limited judicial review accorded administrative action, is only a "procedural" change. The argument is made, moreover, even though the Commission admits (Br., p. 15) that "arbitration could result in a radical difference in ultimate result."

Much of what needs to be said in response to that contention is contained in our main brief at pages 26-29. It will suffice here to add only two comments. *First*, there is no substance to the claim that the arbitration provision in the contract is no longer important because the Secretary of the Interior is no longer an *ex officio* member of the Federal Power Commission. It remains true now, as in 1930, that three parties are concerned in fixing the

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\* The Secretary suggests (Br., p. 20n.) that the Company license is not a contract. Recognition by the Commission, however, of the contractual nature of the license extends from its first Annual Report—"The license is a contract between the government and the licensee . . . and, except for breach of conditions, cannot be altered during its term either by the executive or by Congress without the consent of the licensee" (p. 50)—to recent testimony by its General Counsel before Congress—"[We] have in effect a contract in this license which can be reopened only as the contract provides it can be reopened". (Hearings Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, on H.R. 12698 and 12699, 90th Cong., 2d Sess., at 71 (June 1, 1968).)

readjusted annual payment—the Company, the Commission, and the Secretary; that arbitration provides a neutral judge; and that determination by the Commission permits one of the parties to the contract to make the decision. Now, as then, this is precisely what was sought to be avoided by the arbitration provision. Moreover, the Secretary remains very much in the picture in any determination by the Commission because of the power of veto he claims over its determination—a power that he cannot exercise over the determination of the arbitrator, whose decision he agreed in 1930 to accept.

*Second*, the substantive nature of the right to arbitration, recognized by the Supreme Court in *Bernhardt Co. v. Polygraphic Co. of America, Inc.*, 350 U.S. 198 (1956) (our main brief, pp. 28-29), is not contradicted by the earlier decision in *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 130 N.E. 288 (1921), to which respondents refer. Judge Cardozo there held no more than that a contract containing an agreement to arbitrate would be enforced, even though the New York law permitting the judicial enforcement of such agreements was passed after the contract was executed. In response to the claim that the New York law, as thus construed, impaired the obligation of a contract, Judge Cardozo answered (130 N.E. at p. 292): "There is no merit in the contention. The obligation of the contract is strengthened, not impaired." Here, precisely the contrary is true. The respondents would have this Court ignore the terms of the contract completely.

(b) Nor can the Commission and the Tribes prevail on the second essential part of their argument, that characterized as a "procedural" right, the right to arbitration is not protected by Section 28. Their fundamental difficulty is the language of that section, which does not qualify its protection of license rights. Giving words their usual meaning—and there is no suggestion that in adopting Section 28 in 1920, or in reaffirming it in 1935, Congress had any special meanings in mind—there can be no doubt

that, if the arbitration provision is read out of the license, the amendment "affects" the license, as Section 28 says it shall not do. Nor is there doubt that if the Company's right to arbitration is gone, the amendment affects the license "rights" of the Company, as Section 28 says no amendment shall do.

Respondents therefore ignore the words Congress used, and seek help in two decisions in the Third Circuit, which it is asserted hold that Section 28 accords no protection to "procedural" rights embodied in a license agreement. Neither decision so holds. While these cases are discussed in our main brief (pp. 24-26), a few words more are in order.

In the first of the cases—*Pennsylvania Power & Light Co. v. FPC*, 139 F.2d 445 (3d Cir. 1943), *cert. denied*, 321 U.S. 798 (1944)—the Pennsylvania Company, a pre-1935 licensee, objected to actions by the Commission on the ground that the Commission was exercising authority granted only by the 1935 amendments. No specific license provision was involved; in fact, as the court pointed out, the Commission had exercised the same authority for many years prior to the 1935 amendments, and its actions had been sustained by four Courts of Appeals. "Those cases," the court added, "are clear authority for the Commission's order here complained of." 139 F.2d at p. 453.

The added comment by the court, to which respondents refer, was thus not only dictum, but both in text and in citation of authority the court reveals that it was not considering Section 28, but was addressing the claim that, apart from contracts, the Pennsylvania company had a right to have the statutes remain as they were. *Crane v. Hahlo*, 258 U.S. 142 (1922), on which the Third Circuit relies, is just such a case; the Court there describes the "right" upon which the plaintiff unsuccessfully relied in these words (p. 146): "The origin of the right is thus wholly statutory, an act of grace by the legislature, . . . so that there is nothing in the nature of a contract in it,

....." The dictum of the Third Circuit thus cannot be assumed to be a judgment on the meaning of Section 28.

The second case to which respondents refer—*Safe Harbor Water Power Corp. v. FPC*, 179 F.2d 179 (3d Cir. 1949), *cert. denied*, 329 U.S. 957 (1950)—demonstrates, not a limitation on the scope of Section 28, but a determination by the court to enforce its guarantee. While the decision is long and complex, it is fairly summarized in our main brief (pp. 25-26). The court did *not* endorse the FPC opinion quoted by the Commission (F.P.C., p. 12). Rather, it held, with Section 28 very much in the forefront of its reasoning, that the determination that the Commission made under Title II of the Act, added in 1935, was precisely the determination that the Commission also made under Section 20 of the 1920 Act, and hence "the requirements of Section 28 are met." 179 F.2d at p. 188. There was no suggestion that a construction of Section 28, confining it to "substantive" changes, was required to reach that conclusion.

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The Tribes (Br., pp. 29-30) and the Secretary (Br., pp. 16-18) contend that, in any event, the Company may not now challenge the applicability of the 1935 amendment giving jurisdiction to the Commission because of an amendment of its license in 1936 and the events which occurred in connection therewith. The contention is without merit.

The basic facts are simple. The license now held by the Company, when issued in 1930 (to its wholly-owned subsidiary, Rocky Mountain Power Company) called for the construction of the dam and three generators in three years. An amendment of the license agreed to in 1932 extended the three-year period for two years. When the Company sought a further extension, it was refused, and the Commission referred the matter to the Attorney General to determine whether proceedings to revoke the license should be instituted against the Company. No such proceedings were ever started, and the reference to the Attorney General was made moot on July 17, 1936, when a

second amendment of the license pursuant to Section 6 of the Act further extended the time and made appropriate changes in the schedule of annual charges payable by the Company to the Tribes, without reducing the total amount to be paid by the Company.

The contention that the Company somehow lost its right to arbitration during or as a consequence of these events takes two forms. The first, advanced by the Tribes (Br., pp. 29 *et seq.*), is that the right to arbitration was lost through estoppel, because, it is alleged, the Company necessarily recognized that Section 10(e) had been amended in respect to Indian rights when it negotiated with the Tribes in connection with the 1936 amendment, and therefore is obliged now to recognize all of the amendments to Section 10(e), including the assignment to the Commission of jurisdiction to fix readjusted payments. The answer to this form of the argument is twofold: the premise is wrong, and in any event the conclusion does not follow.

The premise is wrong because the 1935 amendments to Section 10(e) had nothing to do with the Company's negotiations with the Tribes. The significant change that *had* occurred between 1930 and 1936 was that the Tribes had organized themselves in October 1935 pursuant to the Indian Reorganization Act of 1934 (48 Stat. 984). Consequently, as the recitals of the 1936 license amendment make clear, the Secretary, who was a party to the original license because of the provisions of a special 1928 statute (our main brief, p. 12), and who was entitled by that statute and Article 41 of the license to be a party to any amendment to the license, simply announced that, since the Tribes were now organized, he would not as trustee for the Tribes consent to the 1936 amendment until the Company had secured the agreement of the Tribes to its terms. As the "Whereas" clauses of the 1936 amendment recite, the Tribes executed a written agreement with the Company in which they "consented to the amendment of the license hereinafter set forth." Thereupon, the Secretary signed and the amendment was made effective pursuant to section 6 of the Act. The amendments to Section 10(e) in 1935 had nothing to do with it.

Moreover, a claim of estoppel cannot arise in such a way. Even had the 1935 amendments to Section 10(e) had a connection with the negotiations with the Tribes, action by the Company under amendments to which it had and has no objection and which did not conflict with its contract rights could form no basis for a claim of estoppel with respect to amendments which, if construed as respondents construe them, would destroy a Company right.\*

The second form of the argument that the Company lost its right to arbitration in 1936 rests on the contention that the language of the concluding paragraph of the 1936 license amendment (Secty., p. 17) shows that the parties, by referring to the 1920 Act "as amended" intended to accept the jurisdiction of the Commission to determine the readjusted annual charge. The language of the 1936 amendment belies any such extreme interpretation of those words. It recites, following the several "Whereas" clauses:

"Now, THEREFORE, the license issued to the Licensee as aforesaid is hereby amended as follows upon the express condition, however, *that such amendment shall not operate to alter or amend said license in any other respect than as herein specified, and shall not in any way constitute a waiver of any other part, provision or condition of said license.*" (Italics added.)

Moreover, again the premise fails to support the conclusion. Respondents read the words 1920 Act "as amended" as if they had reference only to Section 10(e) and ignore Section 28. The Company, relying on the specific protection accorded its license by Section 28, could without prejudice to its right to arbitration have agreed to accept the 1920 Act as amended, and not have affected its rights in any way. The Act, as amended, expressly repeated the assurance of Congress that its pre-existing license rights would not be impaired.

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\* If any estoppel is to be derived from those events, it would seem to run in favor of, rather than against, the Company. As we point out immediately below, the 1936 license amendment, to which the Tribes, the Secretary and the Commission agreed, expressly preserved the arbitration provision in the 1930 license.

**The Commission's Assertion of Jurisdiction Raises Grave Issues  
as to the Jurisdiction of This Court**

The Company's main brief set out at some length the jurisdictional problems created by the assertion of the Secretary that his approval is required of the decision of the Commission. Changes in the position of the Secretary since then warrant a brief comment.

One change is more apparent than real—the disavowal (Secty., p. 25) of the claim previously made by the Secretary that he must also approve the decision of this Court (our main brief, p. 30n.). The Secretary continues to assert (p. 25n.) that if the case is remanded to the Commission, his power of approval of the action of the Commission remains unimpaired. The Court is therefore faced—unless, as we urge, the right to arbitration is enforced—with a direct challenge to its authority to make an effective remand. To take a simple illustration, a remand by the Court to the Commission with instructions to reduce the rate of interest, or to exclude the third unit from the readjusted charges, is apparently able to be carried out by the Commission only if the Secretary ultimately concurs; he asserts that if he fails to approve the order of the Commission he could nullify the whole proceeding. The Secretary has approved only the present order of the Commission. It appears still to be true, as we stated in our main brief (p. 34) that the Court is “put in the position of making a decision which will be final if it agrees with the Government, and not final if it disagrees.” \*

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\* The assertion by the Commission (Br., p. 20n.) that the Secretary's veto “is fully subject to judicial review” is not only a very generous reading of the record at R. 1564A, but also is not repeated in the Secretary's brief. Certainly the standards which would be applicable in any such review proceeding are left wholly at large.



The second change is that the Secretary has intervened in No. 21904, and hence is now before this Court. The extent of his approval power could, therefore, be finally determined, were the Court so inclined. However, this would involve the examination of a multitude of statutory enactments extending over more than a century—a task for which the briefs furnish no assistance.

The essential point made in our main brief remains: the Court can avoid a constitutional and statutory thicket by determining that the arbitration clause should be enforced, as the Montana District Court has announced that it is ready to do as soon as this Court rectifies the Commission's erroneous assertion of its own jurisdiction (our main brief, App. C, pp. 19a-21a). The Secretary has already expressly exercised his responsibility to the Tribes, in approving Article 30(D) of the license, with respect to the readjusted annual rate.\* Proceeding with arbitration in accord with the contract between the Secretary, the Commission and the Company, will avoid the need to resolve the major problems that otherwise face the Court.

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\* The Secretary has laid a complex statutory foundation, including the 1935 amendments to Section 10(e), for his claim that any Commission order readjusting charges requires his approval. Whatever the validity of that foundation, it has no relevance to an arbitration award that the Secretary has agreed to accept and by which he would be bound.

Nevertheless, respondents (F.P.C., p. 21; Secty., p. 24n.) urge that if the Secretary's approval of an arbitration award is required, enforcing Article 30(D) will raise the same constitutional and jurisdictional problems as are presented here. The Court, they imply, is therefore faced with a Hobson's choice.

The argument is wholly fallacious. Without cataloguing all the differences between the two situations, we need only recall that an arbitrator is neutral, whereas the Commission is a party to this contract, and can advance the policies which it espouses only by gaining the approval of the Secretary. The very fact that the Secretary has taken a particular position has effects upon the Commission's decision-making which are, as we point out on pages 55-56 of our main brief, incompatible with basic requirements of fair administrative procedure. Arbitration raises none of these problems. Moreover, an arbitration award is not subject to review by this Court and hence the jurisdictional problems here involved would not arise.

## II

IN ANY EVENT, THE ADJUSTED ANNUAL CHARGE  
FIXED BY THE COMMISSION MUST BE SET ASIDE

## A

The Commission Exceeded Its Authority in Determining the  
Adjusted Annual Charge as a De Novo Matter

Respondents continue the pattern, set by the Commission in its opinion, of ignoring the distinction between setting an annual charge for the first time—the issue involved in the Third Unit case (*Montana Power Co. v. FPC*, 112 App. D.C. 7, 298 F.2d 335 (1962))—and *readjusting* a rate already once agreed to as reasonable—the issue involved here. The Secretary of the Interior (Br., p. 31) dismisses the discussion by this Court of the nature of a readjustment—in *California Oregon Power Co. v. FPC*, 99 App. D.C. 263, 239 F.2d 426 (1956) (our main brief, p. 37)—as mere dictum, which it is not; the other respondents ignore it entirely.

The pervasive character of this aspect of respondents' briefs warrants a further comment. The Commission asserts (Br., pp. 22-23) that it is impossible to *readjust*, and consequently the Commission was justified in proceeding to fix an annual payment *de novo*, because the precise factors that entered into the annual charge fixed in the original license are not known. The assertion misses the point. One fact is known—that the charges fixed in the original license were agreed by everyone to be reasonable when they were set. It is wholly unnecessary to know precisely every element that was considered by the parties in arriving at that conclusion at that time. What is important in the readjustment of a charge originally reasonable is the determination of what has since changed, and what dollar differences in the amount of the annual charge should reflect any such changes.

This the Company sought to do. It is simply not the fact (FPC, p. 26) that "Montana proposes no alterna-

tive rational method . . . .” Mr. Seymour, a witness for the Company, presented to the Commission (R. 693 *et seq.*) just such a detailed analysis and evaluation of changes since the last agreement on reasonableness. While it is of course true that the Commission was not obliged to accept either Mr. Seymour’s list of changes or his conclusions on their dollar significance, it cannot be denied that the Company’s analysis is “rational.” Indeed, it is precisely what is called for in a readjustment determination.

Of course it is true that respondents do not like a *readjustment*. There is no doubt that it would not achieve the startling \$950,000 annual charge arrived at by the Commission. Hence, the Company’s method was unsatisfactory for use in the approach admitted by the Examiner, and perhaps followed *sub silentio* by the Commission as well—“the first step in resolving the problem . . . was to select a reasonable figure as a readjusted annual charge after considering all the circumstances and then, as a second step, to adopt an acceptable method to support the charge” (R. 9734). We submit, however, that one cannot approach an examination of whether a charge continues to be reasonable, or the extent to which it should be readjusted, with a preconceived idea, without violating every rule of fair and rational procedure, and indeed subverting the administrative process.

It is of the essence of readjustment to start with the one unchallengeable fact—the amount that all parties agreed was reasonable when they made the original contract. This is not simply a matter of semantics or abstract analysis. Once the Company has entered into a 50-year contract and made major investments of capital in reliance upon it, the slate cannot be wiped clean—either in theory or in fairness. The parties are no longer on an equal footing, as prospective lessor and lessee, approaching the problem of determining a rent *de novo*. Since the Company is locked in, the adjusted rentals to be paid in the middle years of the license term must have some rational relation-

ship to the rentals fixed when the parties were free to bargain and accommodate their affairs to the outcome.\* This minimal protection or reliance contained in the statutory term "readjust" lies at the heart of this Court's holding in *California Oregon Power Co. v. FPC*, *supra*.

Indeed, the Commission's adoption of a *de novo* approach is even more arbitrary than the above discussion would indicate. In adopting the Van Scoyoc "profitability" method, the Commission accepted a basis for determining the annual payment that had been *expressly* rejected as a satisfactory basis for determining the annual payment by all of the parties to the contract when it was originally signed (our main brief, p. 38). The Commission rejected, and presumably found unreasonable, a rate for the third unit, for at least a portion of the readjusted period, which it had *expressly* found reasonable only a few years before (our main brief, pp. 37n., 52-55). And the Commission, in respect to any further readjustment of the annual charges, has *expressly* accepted the Company's approach that a showing of the inappropriateness of the existing charge will be required (our main brief, p. 37).

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A comment may be warranted on respondents' references, by the Tribes in particular, to the Company's alleged "return on investment," ranging from 8.9% to 11.2% from 1959 to 1964 (*e.g.*, Tribes, pp. 3, 20, 36; FPC, p. 28, n. 27). The references are doubtless intended to suggest that the Company is making unconscionable profits, and can well afford to be required to share them with the Tribes. The fact is that the Montana Public Service Commission, which undeniably has responsibility for determining what assets are to be included in the Company's rate base (a matter on which it apparently disagrees in

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\* It is not enough to say, as respondents do, that a *de novo* finding of a new rental different from the old is an automatic finding that the old is "unreasonable." A current rate must be shown to have become "unreasonable" for *reasons*, which will then guide the readjustment and provide the rational relationship between the new and the old rentals.

important respects with the Federal Power Commission) and how their current value should be determined (on which it also apparently disagrees with the Federal Power Commission), has determined that the Company's rate of return on the consumer rates which it authorized was 5.33% in 1958, and 5.42% in 1964 (our main brief, p. 48). The exhibit on which the Tribes rely (CT-5, Sch. 6, Sheet 2, R. 1555) is a document constructed by a Tribes' witness that expressly rejects the judgments of the Montana Commission.\*

## B

### **The Method by Which the Commission Fixed the New Annual Charges Is Unreasonable, and Unreasonably Applied**

1. Since the filing of our main brief, the Commission has itself taken action that highlights the arbitrary nature of the Van Scoyoc "profitability" method of determining the annual "value" of the Kerr project (see our main brief, pp. 40-43). In summary (see our main brief, pp. 40-41), that method involved two steps. First, the Company's revenue dollars were assigned to three groups of assets—generating plants, transmission facilities, and distribution facilities. The proportion of the Company's income allocated to its generating plants was determined by adding together the portions of the Company's rate base contributed by each of those plants, and dividing that sum into the Company's total rate base. Second, those revenues thus separated out and assigned to the generating plant group were assigned to a particular plant, not on its rate base contribution, but on the basis of the power production and capacity of each plant.

Our main brief (pp. 41-42) details the arbitrary characteristics of this second allocation step. Our position

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\* It is equally irrelevant and misleading to suggest that the \$950,000 figure arrived at by the Commission is less significant because by paying it the Company will effect a reduction in its taxes (Tribes, p. 20). The significant fact—since the Company is part of a regulated industry—is the added burden on Montana users of electricity that must equal the difference between \$238,375 and \$950,000.

now finds confirmation in a decision and order of the Commission (No. 370) issued on September 27, 1968, establishing a method for determining the "net investment" in a project for purposes of ultimate "recapture." The supporting decision of the Commission recognized that, as in this case, "it is necessary to know how much of the over-all earnings of a licensee should be allocated to [each of the] project works" (Op., p. 38). In deciding how best to do that, the Commission recognized, as we have urged in our main brief, that "One of the factors which must be kept in mind with respect to allocation arises from the fact that we are dealing with a regulated industry" (*id.*, p. 39) and that in such an industry "in theory each dollar of rate base earns the same amount in every plant" (*ibid.*). Having that as well as other factors in mind, the Commission expressly *rejects* the method of allocation on the basis of power production and capacity—the method of allocation it utilized in the second step in the present case—and concludes that the method it used in the first step in the present case—on the basis of investment—is preferred (*id.*, pp. 39-42). We submit that there could scarcely be better proof that the Commission's action in the present case was arbitrary.

The following analysis of what the Commission has done in the present case in approving the second step in Van Scoyoc's method of allocation may be helpful. That method means that any plant with a relatively large contribution to the rate base and a relatively small contribution to power production and capacity, will draw into the "generating plants" box, in the first step of the allocation, revenues that would otherwise have been attributed to the "transmission" or "distribution" boxes. Once those revenues are allocated to the "generating plants" box, however, they would be attributable, not to the plant that drew them there, but to another plant that made a relatively larger contribution to power production and capacity.

This analysis can be illustrated by reference to the Company's steam plant (see our main brief, p. 41), which produced no power at all in one year. The Company's

investment in that plant drew revenues into the "generating plants" box in that year, but since it produced no power that year, it did not share on the basis of power production in the allocation among generating plants of those "generating plants" revenues that it had brought into the "generating plants" box; those revenues went to other plants, including Kerr. The brief for the Tribes (pp. 35-36) describes this as merely an "anomaly"; the brief for the Commission admits the validity of our point (p. 30n.), but says that the steam plant would *partially* share in the revenues that it brought into the "generating plant" box because the second step allocations were on the basis of both production and capacity. In truth, the steam plant example is neither an anomaly nor unimportant; it is rather a concrete illustration of the basic defect in the Commission's method. The absolute size of the Company's annual payment to the Tribes for the Kerr product is being determined, not just by the proportion of power production and capacity that Kerr contributes, but by the proportion of the Company's resources that it has invested in all power production facilities. If the Company had invested less in power plants other than Kerr, the size of the income pie that Kerr shares in the second step would be smaller, and the size of the annual payment would be equivalently smaller. If Kerr had been the only generating plant, the amount of "profit" assigned to it would have been exactly proportional to the Company's investment in it. In sum, the Company is being required to pay rent upon its investment in other generating plants.

A comment is also warranted on the Commission's attempt to defend the second step allocation by asserting (Br., p. 29) that the Company's earnings are based on its power production rather than on its investment. The assertion is not only erroneous, but beside the point. Whether or not the income of a regulated industry is ultimately derived from production or investment, in *this* case, under the profitability method used here, the income that the Commission is allocating in its second step is



admittedly derived (in the first step) from the Company's *investment* in each power plant, not the power production or capacity of these plants.

While we continue to urge that the Commission's profitability method is not appropriate for application in this case, it is nonetheless fair to point out that had it been carried through consistently, and had Van Scoyoc accepted the Montana Public Service Commission's rate base, the profitability theory would have shown that Company income assignable to an asset in proportion to its contribution to the Company's rate base was equal to the income representing the allowable rate of return on that portion of the rate base. But even on Van Scoyoc's assumption as to the rate base, a consistent application of his theory would have drastically changed his result. Company Exhibit 34 (R. 1718) is a calculation of this sort, using Van Scoyoc's own figures. The result is an annual value of \$1,087,428, rather than Van Scoyoc's—and the Commission's—\$2,254,286. That on this basis there is an "excess" profit of \$1,087,428 is due to the difference between Van Scoyoc's assumption as to the Company's rate base and the calculation of that rate base by the Montana Public Service Commission; had the latter been used, the result would be zero.

One other aspect of the application of the "profitability" method warrants further comment—the challenge by both the Tribes and the Commission to the Company's assertion (Br., p. 44) that Van Scoyoc, in allocating revenues to the Kerr project, *included* headwater benefits paid to the Company, but *excluded* headwater benefits paid *by* the Company (F.P.C., p. 31; Tribes, p. 39). There is no dispute about his exclusions—he did not include any amounts paid out by the Company. The issue is whether he included payments the Company received.

The record does not support the respondents' challenge. The Commission admits (F.P.C., p. 31) that Van Scoyoc

included payments to the Company in computing system operating income. Necessarily, therefore, a portion of these benefits was attributed to "generating plants" in the first step allocation, and a portion of those benefits was thus necessarily assigned to the Kerr plant in the second step allocation. By admittedly excluding similar payments made *by* the Company—the debit that was associated with this credit—Van Scoyoc and the Commission miscalculated the "value" of the Kerr plant even within the terms of their own method.\*

It is appropriate at this point to refer to the claim made in No. 21767—that the Commission erred in not adjusting Van Scoyoc's figures upward by an amount representing the alleged excess of headwater benefits received by the Company over those paid out by it. As the Commission properly points out (Br., p. 32), the exhibit upon which the Tribes rely does not in fact reveal the amount of the federal headwater benefit payments made to the Company, since they are included in payments made to the Company under a Coordination Agreement on a number of bases, of which headwater benefits is only one. It should be noted that the Secretary, who prepared and introduced the exhibit on which the Tribes rely, did not see fit to support the Tribes' petition through intervention.

2. The Commission challenges our analysis (main brief, pp. 49-52) of the allocation of the annual value between the Company and the Tribes. Its brief denies, as we assert, that the entire value of the Hungry Horse waters was allocated to the Tribes (F.P.C., pp. 35-36).

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\* The Tribes (p. 40) suggest that the Third Unit case is authority for ignoring expenses in calculating "profit." That is, of course, absurd. The Commission in the Third Unit case was not purporting to calculate or attribute past profits. It was fixing the initial rents for an asset to be used in the future, and this Court merely held that the Commission could settle the cost of the asset to the Company without waiting to see what other costs would materialize during the use of the asset.

This issue can be resolved by the relatively simple process of tracking through what the Commission actually did in constructing a 42.13% share. The sharing formula which results in 42.13% begins with a 50-50 split of the "value" of a project between the contributor of the site and the contributor of the development (R. 260, 275; F.P.C., p. 36). *This split is not in controversy.*

The issue is as to the *further* split that must be made here because the developer also contributes one-half the site, namely, the north half of the reservoir. In making *that* split the Commission abandoned the practice of giving each acre in an integral project the same value—as is customary in the valuation of land for power purposes (R. 271)—and instead purported to allocate to various acres a value proportional to the water—and therefore power—each "contributed," in some metaphysical sense, to the turbines. The acres underlying the dam were given a value separate from those underlying the reservoir, on the assertion that a plant could have been constructed using only the river water, even though the Record showed (R. 275-76; Scattergood Report, p. 65, R. 8293) that such a plant would be uneconomical.\* Specifically, the reservoir acres were deemed to contribute 376 megawatt months of power, which was split 50-50 between the Company and the Indians on the basis of their 50-50 ownership of those acres. There was then added to the Indian share all of the 161 megawatt months deemed to be contributed separately by the river, which once had flowed over their acres beneath the dam.\*\* The reason given by the Commission for thus inflating the Tribes' share—that an economical run-of-the-river plant could have been constructed on the Tribes' land alone—is, as we have said, unsupported by the record. In

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\* The Commission's assertion that the record demonstrates that a run-of-the-river plant would have "substantial value" is not supported by any record citation. (F.P.C., p. 35.)

\*\* The Tribes suggest in their brief (p. 42) that the Commission gave extra points for the "narrow, high, solid rock walled canyon" at the damsite. It did not. The Commission was concerned solely with the flow in the riverbed, and the power it could produce without storage in the Kerr reservoir.

any case it is arbitrary to give different values to lands mutually necessary to a total project.

But the Commission went even further. Its next step was to attribute to the damsite acres all of the generation deemed produced by Hungry Horse waters. The Commission's brief (p. 36), after reciting that 161 megawatt months of generation was derived from natural stream flow at the damsite and 657 megawatt months was derived from Hungry Horse waters, concludes:

"This meant that the generation at the damsite, without any Flathead storage reservoir, would contribute 818 MW months generation or 68.5 percent of the total."

The figure of 818 megawatt months is the sum of 657 and 161. Attributing Hungry Horse water to the damsite acres assigns its entire value to the Tribes as much as does attributing the river flow to the damsite acres. The only "sharing" of the benefits of Hungry Horse is thus the initial split between the contributor of lands and the contributor of the development.

The Commission gives no reason whatever for thus assigning Hungry Horse water. Neither the Commission's opinion nor its brief explains or defends it; the figure of 657 megawatt months is silently added to 161 megawatt months. Actually, as we point out in our main brief (p. 51), attributing Hungry Horse flow to the damsite acres is arbitrary on its face. The Hungry Horse water is contributed by Hungry Horse, not the original river; it is regulated and made usable for power by the Kerr Reservoir, and its value could not be realized by even the dam and reservoir together without the Montana Power Company system and coordination agreements.

We should also point out that none of the respondents has even attempted to answer the point we made in our main brief (p. 52)—that combining, as the Commission did, the Van Scoyoc profitability method of determining annual value with the Sporseen method of computing the sharing formula, compounds the advantage accorded the Tribes

This issue can be resolved by the relatively simple process of tracking through what the Commission actually did in constructing a 42.13% share. The sharing formula which results in 42.13% begins with a 50-50 split of the "value" of a project between the contributor of the site and the contributor of the development (R. 260, 275; F.P.C., p. 36). *This split is not in controversy.*

The issue is as to the *further* split that must be made here because the developer also contributes one-half the site, namely, the north half of the reservoir. In making *that* split the Commission abandoned the practice of giving each acre in an integral project the same value—as is customary in the valuation of land for power purposes (R. 271)—and instead purported to allocate to various acres a value proportional to the water—and therefore power—each "contributed," in some metaphysical sense, to the turbines. The acres underlying the dam were given a value separate from those underlying the reservoir, on the assertion that a plant could have been constructed using only the river water, even though the Record showed (R. 275-76; Scattergood Report, p. 65, R. 8293) that such a plant would be uneconomical.\* Specifically, the reservoir acres were deemed to contribute 376 megawatt months of power, which was split 50-50 between the Company and the Indians on the basis of their 50-50 ownership of those acres. There was then added to the Indian share all of the 161 megawatt months deemed to be contributed separately by the river, which once had flowed over their acres beneath the dam.\*\* The reason given by the Commission for thus inflating the Tribes' share—that an economical run-of-the-river plant could have been constructed on the Tribes' land alone—is, as we have said, unsupported by the record. In

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\* The Commission's assertion that the record demonstrates that a run-of-the-river plant would have "substantial value" is not supported by any record citation. (F.P.C., p. 35.)

\*\* The Tribes suggest in their brief (p. 42) that the Commission gave extra points for the "narrow, high, solid rock walled canyon" at the damsite. It did not. The Commission was concerned solely with the flow in the riverbed, and the power it could produce without storage in the Kerr reservoir.

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from Hungry Horse. This double advantage is unreasonable and arbitrary in the extreme.

### C

#### **In Any Event, the Commission Erred in "Readjusting" the Annual Payment for the "Third Unit"**

Respondents continue, we believe, to misread Section 10(e) of the Act with respect to the power of the Commission to accelerate a readjustment of the annual payment for the third unit (our main brief, pp. 52-55). Respondents' error lies in disregarding the express holding of the Court in the Third Unit case, *Montana Power Co. v. FPC*, 112 App. D.C. 7, 298 F.2d 335 (1962) that the authorization granted by the Commission (112 App. D.C. at p. 11)—

"although called an amendment, *was a new and original license for the third unit*, within the meaning of Section 4(e) of the Act, and was subject to the requirements of Section 10(e) with regard to the use of the tribal lands."

Notwithstanding this express language, the Commission (Br., p. 37) continues to assert that this Court agreed that an additional charge could be assessed for the third unit by the Commission "when it *amended* the license to authorize the additional project works" (p. 37).

The fact that the third unit authorization was a *new and original license* under Sections 4(e) and 10(e) of the Act, rather than an *amendment* to the original 1930 license under section 6 of the Act, is critical to the Commission's authority to attempt readjustment of rental payments for that unit only six years after it went into service. Had the authorization been an amendment (as the Company argued it was in the Third Unit case) the rentals set for the project could not have been increased in 1954, because Section 10(e) prohibited any readjustment of rentals paid pursuant to the 1930 license before 1959. (The addition of that unit could, of course, have been taken into account in the *readjustment* of rentals for 1959-1968 here involved.) This Court, however, held that the third unit was authorized by a new license, not an amendment to the old, and



that it was therefore "subject to the requirements of Section 10(e) with regard to the use of the tribal lands." This legal separation of the third unit meant that rents could be set for it under Section 10(e) without regard to whether the twenty-year period had run for the rents set for the project under the 1930 license. But it also meant that the rentals set as of 1954 were protected against change as of 1959 by the further requirement of 10(e) that a licensee making an investment shall have a 20 year year period of certainty as to the charges fixed in his license. Our main brief, pp. 16-21, sets out the Congressional policy which lay behind this clear principle of repose written into Section 10(e).

Contrary to the suggestion of the Commission (Br., pp. 37-38), whether the third unit is or is not part of the "Kerr project" under Section 3(11) of the Act is not the issue here. The issue here is whether under Section 10(e) the provisions of one license can project into and govern the subject matter of another. To say that they can is a patently impossible construction of the section, for both the repose decreed by Congress and the distinction which this Court found between an amendment to a license and the creation of a second, separate license, would be effectively read out of the section. If Section 10(e) does not mean, as this Court held, that the Company is protected against readjustment of its annual charges during the first 20 years of the Kerr project, irrespective of what "project works" are included in that "project," then Section 10(e) must mean that each new license accords the Company protection for 20 years from the time it begins the operations authorized by that license\*.

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\* The difference in legal effect between separate licensing of project works and amending an original license for a project has been recognized in other contexts. See Order No. 370, Sept. 27, 1968, p. 42 n.32:

"In cases where it appears that the application of this rule could cause additions or betterments to a project required for comprehensive development to be financially infeasible to the licensee, the Commission will give consideration, upon a proper application and showing, to providing appropriate relief, through separate licensing of such project works for terms coincident with that remaining for the original license or by other means."

The Commission cannot have it both ways—increasing the rentals before the end of the twenty-year period running under the original license, on the ground that the third unit authorization is a new license which started the Section 10(e) rental procedures afresh, and then increasing the rentals again from the end of the twenty-year period running under the original license, on the ground that the third unit authorization was, after all, only an amendment of the original license. The issue of whether the readjustment provisions of the 1930 license—on which this readjustment proceeding is based—apply to the third unit through amendment of the 1930 license was settled by this Court in the Third Unit case and cannot be relitigated. As the Court stated:

“The provisions of the license concerning the initial installations as to payments and other conditions cannot logically be said, it seems to us, to project into and become parts of a new license for different and additional project works.” 112 App. D.C. at 11.

### III - IV

#### RETROACTIVITY AND INTEREST

On the issues raised in these last two sections of our main brief, the respondents largely repeat the arguments made in the Commission's opinion, with which we have already dealt. Only a few brief comments are necessary.

##### *As to retroactivity:*

The Commission has misstated the Company's position on whether it could have protected itself by creating a contingency reserve in 1959. We did not urge, as the Commission has it (p. 41), that the Company “could not possibly have justified the creation of reserves beginning in 1959.” What we did urge (p. 59) and believe to be true, is that the Company could not have justified a reserve “of the magnitude contemplated here.” The Montana Public Service Commission would simply not have agreed that such an additional burden on Montana rate payers could be justified on the assumption that the annual payment might be quadrupled in 20 years, particularly in view of the rentals set in 1961 for the third unit.

*As to interest:*

Two brief comments are in order. First, the Commission's attempt to analogize the interest it imposed in this case with the interest attached to back pay orders of the National Labor Relations Board is unconvincing. As we point out in our main brief (p. 62), there is a recognized difference between cases where the principal amount is assessed because of the wrong-doing of the debtor, and cases where it is not. Back pay orders result from a finding that the Labor Relations Act has been violated. Here, there can be no question but that there has been no illegal activity—or even any bad faith—on the part of the Company.

Second, the Commission, in rejecting our contention (Br., pp. 62-63) that the 4 percent rate which it deemed proper in the Third Unit Case, and which is all that the United States pays to the Tribes when it has the use of their moneys, argues that the Company would be unjustly enriched (Br., p. 42; see Tribes, p. 48), and hence should pay at "the prevailing commercial rate." The Commission's 6 percent rate of interest cannot be so justified. As we have pointed out in our brief (p. 63n.), the commercial rate at which the Company could have borrowed the same amount of money, over the period from 1959 to 1967, was at times as low as 4½ percent, and averaged only 4.8 percent.

Respectfully submitted,

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RECEIVED

OCT 31 1968

JOINT APPENDIX

United States Court of Appeals  
for the District of Columbia Circuit

CLERK OF THE UNITED  
STATES COURT OF APPEALS

FILED OCT 31 1968

IN THE

*Nathan J. Paulson*  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 21904**

THE MONTANA POWER COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA,

and

THE SECRETARY OF THE INTERIOR, *Intervenors.*

**No. 21767**

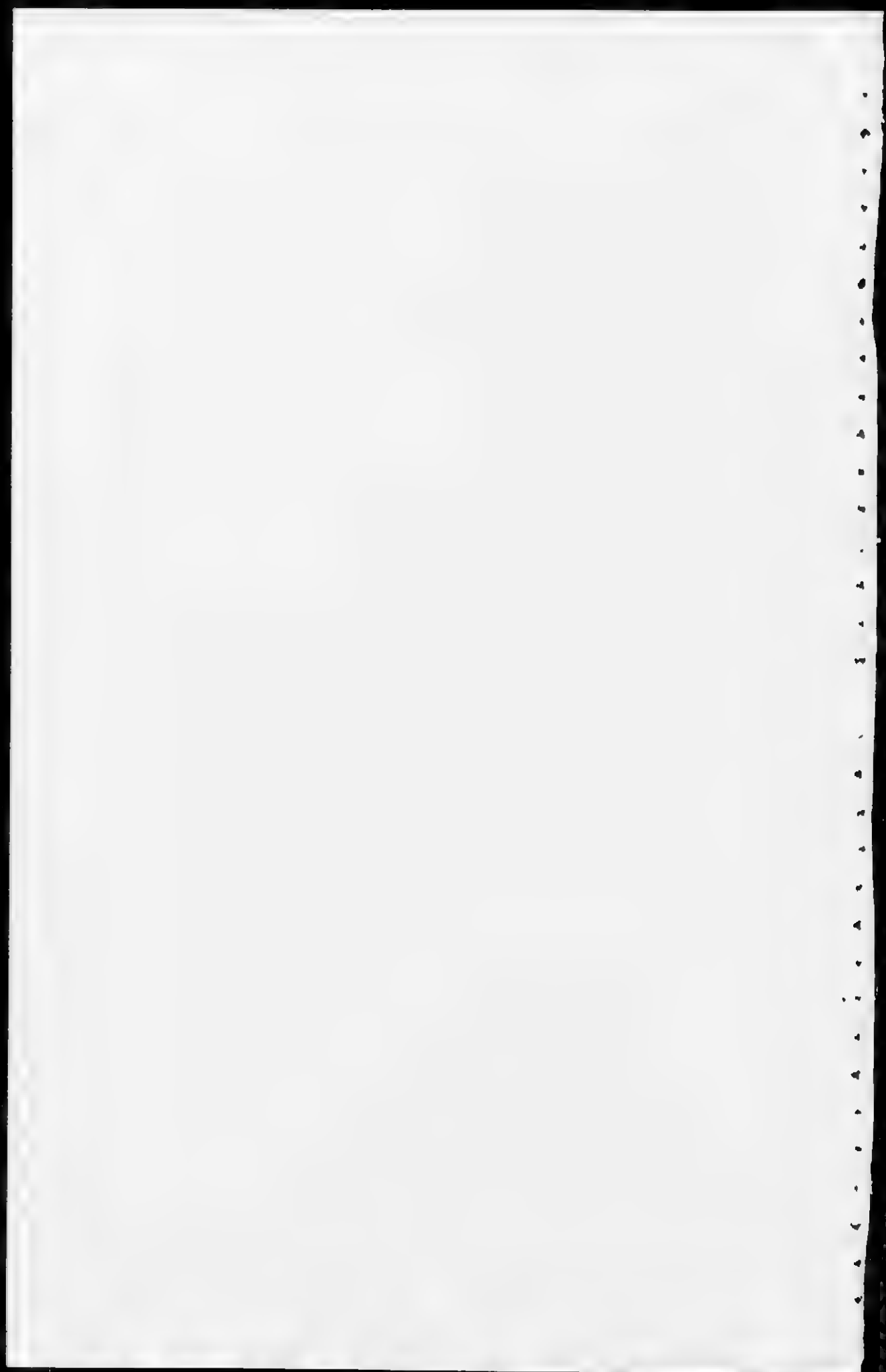
THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD RESERVATION, MONTANA, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent,*

THE MONTANA POWER COMPANY, *Intervenor.*

**Petitions To Review Orders of the Federal Power Commission**



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### Docket Entries

- Confederated Salish and Kootenai Tribes Petition for the Recalculation of Indian Rentals Pursuant to Section 10(e) of the Federal Power Act, Project No. 5, received May 19, 1959.
- Order Fixing Hearing, Project No. 5, issued March 29, 1965.
- Montana Power Company Motion to Dismiss Petition for Readjustment of Annual Charges and Vacate Hearing Set for July 20, 1965, Project No. 5, received April 14, 1965.
- Flathead Indian Tribes Opposition to Motion filed last above, Project No. 5, received April 15, 1965.
- Stewart L. Udall, Secretary of the Interior Petition to Intervene and Motion to Extend Time, Project No. 5, received April 30, 1965.
- Order Permitting Intervention and Extending Time for Filing Evidence and Time for Hearing, Project No. 5, issued May 21, 1965.
- Designation of Presiding Examiner, Project No. 5, dated June 1, 1965.
- Montana Power Company, Request for Oral Argument on Motion to Dismiss Petition for Readjustment of Annual Charges, Project No. 5, received June 4, 1965.
- Commission Staff Counsel request for prehearing conference, Project No. 5, filed June 7, 1965.
- Presiding Examiner's Ruling on Request for Prehearing Conference, Project No. 5, issued June 8, 1965.
- Montana Power Motion for Extension of Time for Filing Answer to Petition, Project No. 5, received June 10, 1965.

FPC letter of June 17, 1965 to Montana Power Co. granting Extension of Time requested last above, Project No. 5.

Commission Staff Counsel letter to Presiding Examiner submitting subjects to be considered at pre-hearing conference, dated June 18, 1965.

Montana Power Company letter of June 17, 1965 submitting subjects to be considered at pre-hearing conference, received June 21, 1965.

Presiding Examiner's Specification of Prehearing Conference Results Pursuant to Section 1.18(d) of the Rules of Practice and Procedure, issued June 25, 1965.

Stewart L. Udall, Secretary of the Interior, Brief in Support of Inclusion of Third Unit in Readjustment of Annual Charges for Kerr Project, received July 1, 1965.

Commission Staff Counsel Memorandum to Presiding Examiner in reply to request of June 25, 1965 above, dated July 1, 1965.

Montana Power Company Request for Ruling and Brief on Question of What Facilities and Annual Charges may be Subject to Readjustment of Annual Charges for Use of Indian Lands, received July 2, 1965.

Presiding Examiner's Ruling Granting Extension of Time, issued July 7, 1965.

U. S. Dept. of the Interior letter of July 6, 1965 requesting change in brief filed July 1, 1965, received July 7, 1965.

Presiding Examiner's Ruling Upon Respondent's Request for a Determination as to the Number of Units of Project No. 5 to be Considered at Scheduled Hearing, issued July 13, 1965.

Montana Power Company Answer, received July 15, 1965.

Confederated Tribes Application for Issuance of Subpoena *Duces Tecum*, received July 19, 1965.

Statement of Commission Staff on Application of Confederated Salish and Kootenai Tribes of the Flathead Reservation to Hearing Examiner for Issuance of Subpoena *Duces Tecum*, dated July 27, 1965.

Confederated Tribes Response to Staff's Response to Application for Subpoena *Duces Tecum*, received July 28, 1965.

Montana Power Objection to Application for Subpoena *Duces Tecum*, received July 29, 1965.

Presiding Examiner's Ruling on Application for a Subpoena *Duces Tecum*, issued July 30, 1965.

Confederated Tribes Motion to be Relieved of Stipulation, received August 3, 1965.

Confederated Tribes Motion for Extension of Time Within Which to File Testimony, received August 9, 1965.

Federal Power Commission Subpoena *Duces Tecum* dated August 2, 1965.

Presiding Examiner's Ruling Granting Extension of Time, issued August 12, 1965.

Montana Power Company Answer to Motion of the Confederated Tribes to be Relieved of Stipulation, received August 13, 1965.

FPC letter of August 26, 1965 to parties of record advising of continuance of hearing, Project 5.

Secretary of the Interior Certificate showing service on parties of record of direct testimony and exhibits, received August 30, 1965.

- Confederated Tribes certificate showing service on parties of record of testimony and exhibits, received August 30, 1965.
- Montana Power Company certificate showing service on parties of record of testimony, received Aug. 30, 1965.
- Montana Power Company certificate showing service on parties of record of testimony, received Aug. 30, 1965.
- Commission Staff Counsel Motion to Strike, dated September 3, 1965.
- Confederated Tribes Response to the Staff Motion to Strike, received September 9, 1965.
- Montana Power Co. Response to FPC Staff's Motion to Strike Exhibits and Tribes' Response Thereto, received September 16, 1965.
- Presiding Examiner's Rulings Upon Applicant's Motion to be Relieved of Stipulation and Staff Counsel's Motion to Strike Certain Exhibits, issued September 20, 1965.
- Commission Staff Counsel certificate showing service on parties of record of prepared testimony and exhibits, dated September 22, 1965.
- Confederated Tribes certificate showing service on parties of record of amendment to testimony, received October 4, 1965.
- Commission Staff Counsel Motion to Strike Prepared Testimony, dated October 11, 1965.
- Montana Power Company Motions to Strike, received October 11, 1965.
- Confederated Tribes Motion to Strike Testimony, received October 11, 1965.
- Montana Power Company Application and Motion for Issuance of a Subpoena, received October 14, 1965.

- Confederated Tribes Motion for Extension of Hearing Date, received October 15, 1965.
- Montana Power Company Motions to Strike, received October 15, 1965.
- Secretary of the Interior Motion to Strike, docketed October 18, 1965.
- Confederated Tribes Motion for Leave to File Reply to Motions to Strike and Reply, received October 19, 1965.
- Presiding Examiner's Ruling Granting Extension of Time, issued Oct. 19, 1965.
- Montana Power Company Reply to Motions to Strike, received October 22, 1965.
- Secretary of the Interior Stewart L. Udall Objection and Answer to Montana Power Company's Motion for Issuance of Subpoena, received October 22, 1965.
- Commission Staff Counsel Reply to Motion to Strike, dated October 22, 1965.
- Secretary of the Interior Motion to Amend Testimony, received October 25, 1965.
- Secretary of the Interior Response to Motions to Strike, received October 25, 1965.
- Presiding Examiner's Ruling Upon Application of the Montana Power Company for Issuance of a Subpoena, issued October 27, 1965.
- Montana Power Company Answer to Objections of Secretary of Interior to Motion for Issuance of Subpoena, received October 27, 1965.
- Confederated Tribes letter of November 23, 1965 submitting C.T. Exhibit No. 10, received November 24, 1965.
- Confederated Tribes Motion for Leave to Submit C.T. Revised Exhibit No. 9, received November 24, 1965.



Montana Power Company transmittal of tabulation (FPC Exh. No. 11), received November 26, 1965.

Montana Power Company Objections to Motions to Correct Hearing Record, received December 2, 1965.

Confederated Tribes Reply to Montana's Objections made last above, received December 6, 1965.

Commission Staff Counsel Motion to Reopen Record to Admit Additional Evidence, dated December 8, 1965.

Presiding Examiner's Rulings Upon Objections to Proposed Transcript Corrections; Making and Receiving into Evidence Certain Items and Exhibits and Motions to Reopen Record to Receive Additional and Revised Exhibits, issued December 13, 1965.

Montana Power Company Motion to Reopen Record to Admit Additional Exhibit, received December 20, 1965.

Presiding Examiner's Ruling Upon Motions to Reopen Record to Receive Corrected and Additional Exhibits and Upon Proposed Transcript Corrections, issued December 27, 1965.

Secretary of the Interior Request for Extension of Time in which to File Opening Brief, received January 26, 1966.

Presiding Examiner's Ruling Upon Request for Extension of Time in Which to File Opening Brief, issued January 28, 1966.

Montana Power Company Motion to Reopen Hearing for the Purpose of Entering in Evidence MPCo's Proposed Exhibit No. 39, received March 4, 1966.

Confederated Tribes Opposition to Montana Power Motion last above, received March 8, 1966.

- Presiding Examiner's Ruling Reopening Record and Receiving Montana Power Company's Exhibit No. 39 into Evidence, issued March 10, 1966.
- Montana Power Company Petition for Oral Argument Before Presiding Examiner, received March 10, 1966.
- Confederated Tribes Reply to Petition filed last above, received March 11, 1965.
- Presiding Examiner's Ruling Upon Petition for Oral Argument, issued March 29, 1966.
- Presiding Examiner's Initial Decision on Application for Readjustment of Annual Charges for Use of Tribal Lands Pursuant to Section 10(e) of the Federal Power Act, As Amended, issued August 4, 1966.
- Montana Power Company Motion for Extension of Time to File Exceptions, received August 18, 1966.
- Confederated Tribes' Opposition to Montana Power Co.'s Motion filed last above, received August 19, 1966.
- Notice of Extension of Time, issued August 23, 1966.
- Montana Power Company Motion for Oral Argument, received October 5, 1966.
- Montana Power Company Exceptions, received October 6, 1966.
- Confederated Tribes Brief on Exceptions, received October 6, 1966.
- Stewart L. Udall, Secretary of the Interior, Intervenor, Brief on Exceptions, received October 7, 1966.
- Confederated Tribes Opposition to Montana's Motion for Oral Argument, received October 14, 1966.
- Secretary of the Interior Motion for Extension of Time to File Brief Opposing Exceptions, received October 20, 1966.

- Notice of Extension of Time, issued October 25, 1966.
- Commission Staff Brief Opposing Exceptions, dated November 9, 1966.
- Montana Power Company Brief in Opposition to Exceptions, received November 9, 1966.
- Confederated Tribes Reply Brief to Montana Power Company's Brief on Exceptions, received November 9, 1966.
- Stewart L. Udall, Secretary of the Interior, Brief Opposing Exceptions, received November 10, 1966.
- Notice Fixing Oral Argument, issued March 21, 1967.
- Opinion No. 529, Opinion and Order Readjusting Annual Charges, Project No. 5, issued October 4, 1967.
- Confederated Tribes Application for Rehearing, received October 19, 1967.
- Secretary of the Interior letter of November 3, 1967 signifying acceptance of Opinion 529, etc., received November 6, 1967.
- Montana Power Company Application for Rehearing, received November 3, 1967.
- Order Granting Rehearing, Project No. 5, issued November 17, 1967.
- Order Denying Applications for Rehearing, Project No. 5, issued March 21, 1968.

IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 21,904 and 21,767

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THE MONTANA POWER COMPANY, and THE CONFEDERATED  
SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESER-  
VATION, MONTANA, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

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On Petition to Review an Order of the Federal  
Power Commission

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**JOINT APPENDIX**

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(22)

**EXCERPTS FROM TRANSCRIPT OF PROCEEDING**

**22**

**Prehearing Conference**

Mr. Frishberg: May I at this point, since we are discussing direct testimony, just reiterate the point that Interior made in our submission to the Examiner of the 18th, and that is that we feel that we cannot be bound in terms of a position we feel we have established by any direct testimony we may present during the course of the proceeding. We fully intend to present direct testimony and participate completely. We also have an ultimate responsibility under various statutes which cannot be impinged upon in any way by any participation in this case. I only say this because I realize the Examiner's desires, and I think they are completely legitimate for expediting the proceeding.

To this end, as I say, we will cooperate. However, we wish to make it quite clear to everyone concerned that we do not waive in any way our right to change our mind or amend what

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we originally suggested if during the course of the proceedings we honestly feel that we should do so.

• • • • •

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Presiding Examiner: That is what bothers me. If you are talking about facts, whether or not they will be bound by them, it seems to me to run to making a declaration prior to eliciting or placing any facts in the record, it seems to me to run to the weight and the facts of testimony to be presented.

Mr. Sander: I have one question that may clarify that.

Mr. Frishberg, when you were talking about amending, did you mean throughout the course of the hearing, or amending a statement of fact after the record is closed?

Mr. Frishberg: I meant throughout the course of the hearing, and, quite frankly, with us after the record is closed, but not as to amending fact.

What bewilders me is your statement, Mr. Sander, that the only thing we have to worry about in this proceeding are facts. We have to worry about theories. We are now applying a formula. We are searching for a formula. As far as the actual components of that formula are concerned, I have no worries. Whether we can or cannot agree on figures—I am pretty sure we can agree on figures, but I am not sure at all we could agree on the formula or approach to be taken. That is not a fact, not in at least my mind. It is a mixed question, if anything, of fact and law.

Mr. Sander: My feeling on this is simply we are making a

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record of facts, and what formula you want to use and what position you want to take is a matter for your briefing, and I am afraid we are getting involved in briefing right now, and I would like to get back to an agreement, if any, on facts. I think we are discussing position, which is premature. This is something for our briefs.

Mr. Frishberg: I would like to say one more thing, and that is that I cannot agree with Mr. McElwain's assumption that we are in some contract, that is the Secretary and/or the Federal Power Commission are in some kind of contractual relationship with the Montana Power Company, or any licensee for that matter.

Insofar as the rest of what I said was concerned, I possibly confused the issue by combining two things. One, in terms of the right or the discretion to amend one's case after hearing, I only bring that up because I feel this is a type of very complex case that may demand something like that by any parties if they will be quite honest, intellectually honest.

(31)

No. 2, our statutory responsibility, to which Mr. Cragun referred, and to which I referred, imposes upon the Secretary an obligation regarding whatever figure is finally recommended by the Federal Power Commission. Whether that figure is in agreement with what we propose during the hearing, or not, or whether we finally, after seeing that figure, feel that maybe that figure is a little closer to ultimate reality than the one

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we proposed, or whether we feel the other way, we just want to point out that we have the obligation, which we cannot waive in any manner, shape, or form, to use our discretion in determining whether or not to approve what the Commission finally decides. To that extent, we cannot necessarily—

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Mr. Sander: I think there is one other thing that has to be contained in this—

Presiding Examiner: Only one?

Mr. Sander: Yes, one that I can think of.

We have heard the Secretary of Interior might or might not be bound by a particular thing or theory, and I am just wondering are we facing the prospect that you may make a ruling one way or another, and the Secretary of Interior might not regard

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himself to be bound by it, and at a later time come up and say "I do not approve this at all"? Then if that is the case we wouldn't be saving much time anyway.

Mr. Frishberg: That is exactly the reason I brought this up now. I realize it might sound premature, but I didn't want to allow the record to remain silent. In other words,



just as Mr. Sander said, to answer his question, that is exactly right. If after participating in this proceeding we might disapprove of the ruling of the Examiner, or the Commission, we reserve the right to express that disapproval under the Acts setting up the Secretary's powers and obligations.

Presiding Examiner: I guess the only thing for you to do is file your memorandum as to what your best thinking is in the next few weeks.

Mr. Frishberg: Was that directed to me?

Presiding Examiner: Yes.

Mr. Frishberg: In regard to our position?

Presiding Examiner: Yes.

Mr. Frishberg: Fine. We offered to file a memorandum on this, and we will be very happy to.

Mr. Sander: Am I to take it if you file a memorandum that this will be the position of the Secretary of Interior?

Mr. Frishberg: In terms of legal responsibilities, yes. We are not talking about position as to the substance of this case; I am talking about the responsibilities or powers that

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the Secretary has as trustee for the Indians. I assume that is what the question was about, and what we would direct our memorandum to.

We are also talking about the third unit. I assume we have the same opportunity as everybody else does to file any opinions on that. I thought we were now talking about the Secretary's position.

Presiding Examiner: As to whether or not the third unit is to be included. That is the problem we have before us, isn't it?

Mr. Sander: The thing I am trying to get clear in my mind is if it is possible to get any assurance, assuming—just assuming—that in your memorandum you take the

position that the third unit should be included, and then you are readjusting charges on the whole project, can we have any assurance that this is the position that the Secretary of the Interior will take?

Mr. Frishberg: Yes, on that issue. I hate to do this on a piecemeal basis. It is the universal thinking in the Interior Department that the third unit should be included. I see absolutely no reason why the Secretary would change his position as to this point. This is a legal position. This doesn't involve any theory or any attempt to arrive at a formula. On this I would think we can or I think I can give you the Secretary's assurance that our position will remain the same as

to the third unit throughout. Both before and after the opinion.

Mr. Sander: I would like to make the request that if possible we do indicate whether this is the ultimate position as to whether the third unit should or should not be included at this time because it seems to me we are going to waste a lot of time considering this whole thing and going around and around and building a record and find out later on it wasn't any good.

Mr. Frishberg: As to the third unit, this will be the Secretary's position, and it will remain constant throughout. I was not really referring to the question of what I consider to be the purely legal questions involved. I am sure our attitude will remain constant on those, the questions of jurisdiction and the question of inclusion of the third unit. On, however, the ultimate acceptance or rejection of the method or formula of valuation, this is what I was referring to.

Mr. Sander: My question, just so we are all clear, is directed specifically to the one point. I wanted assurance, if possible, if you took the position that the third unit was to be included, that that would be the position of the Secretary of Interior in this proceeding.

Mr. Frishberg: It will be.

Mr. Sander: Thank you.

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Presiding Examiner: The conference will come to order.

Mr. McElwain: May it please the Examiner, Mr. Cragun will give the preamble to what we have agreed on and then I think I can give for the record the matters of agreement.

Mr. Cragun: What follows is subject to the right of any party to object to their consideration on grounds of relevancy or materiality. The following matters may be taken as true without further proof:

Mr. McElwain: (1) Kerr Dam, a part of Project No. 5, is located on the Flathead River southwest of the Town of Polson, Montana. Flathead Lake and Reservoir lies north of said Polson, Montana.

Project 5 is located partially on tribal reservation lands belonging to the Salish and Kootenai Tribes of the Flathead Reservation and partially on fee lands and flowage rights acquired by the Montana Power Company. The dam and powerhouse and approximately the south one-half of the reservoir area are located on tribal lands.

The dam is a variable radius concrete arch 381 feet long, 200 feet high, with 179 feet radius at top. The storage capacity of Flathead Lake between elevations 2883 and 2893 is 1,217,000 acre feet. The development has three units, two of which are 77,000 horsepower, and the third a 78,500 horsepower Francis type turbines, each driving a 56,000 kilowatt generator.

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The first generating unit began operations on May 20, 1939, the second unit on May 31, 1949, and the third unit on December 5, 1954.

(2) The license for Project No. 5 and all amendments thereto are to be considered a part of the hearing record as Item A by reference.

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(3) The FPC form 1 and Form 12 for the years 1939 to 1964 of the Montana Power Company, so far as they pertain to the Kerr Project No. 5, are made a part of the hearing record as Item B by reference.

(4) The Hungry Horse Dam and Reservoir, located on the south fork of the Flathead River, approximately 81 miles above the Kerr Dam, is owned by the United States and operated by the Bureau of Reclamation. It has active storage of 3,166,000 acre feet, which storage is released on a scheduled basis at periods of low flow on the Flathead and Columbia Rivers. By orders of the Federal Power Commission, the Montana Power Company has paid to the United States for the use of Hungry Horse stored water in Kerr pursuant to the provisions of Section 10(f) of the Federal Power Act, the following sums:

<u>Year</u>	<u>Sum</u>
1952	25,260
1953	7,200
1954	59,900
1955	83,800

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<u>Year</u>	<u>Sum</u>	
1956	165,300	
1957	166,600	(Ordered
1958	0	{ but
1959	22,700	{ not
1960	44,100	{ paid
1/1/61 to 8/31/	1961	87,000 {
9/1/61 to 8/31/	1962	174,900
9/1/62 to 8/31/	1963	174,900
9/1/63 to 8/31/	1964	167,100
.	.	.

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Mr. Frishberg: We would like to have our letter included, but only as to the preliminary statement. I don't care about any agenda suggestions, but just as to the preliminary statement regarding our position. I would like that to be made a part of the record. Maybe that is a little less confused than my oral statement today.

Presiding Examiner: I think you are pretty well on record about the matters contained in this preliminary statement. However, if you wish to include it, I will grant your request.

Mr. Frishberg: I would appreciate it if that would be done.

Presiding Examiner: All right. I don't think it will take up more than a page in the record.

(Statement referred to by counsel for the Secretary of Interior is as follows:

"It is our position that the Secretary of Interior has both a duty and a right to approve any readjustments of annual charges ordered by the Federal Power Commission to be paid to the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation for the use of Tribal lands under the above-described license. This veto power is based upon general and specific statutes and is expressly preserved in the terms of the license for Project No. 5.

"Accordingly, although we will cooperate fully with

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the Commission and the parties in this proceeding, such participation shall not be construed as abandonment of the Secretary's ultimate power of approval over such readjusted charge as may be ordered by the Commission. Nor shall such participation, including such proposals as Interior may advance, be construed to bind the Secretary in the exercise of his power of approval."

(74)

Presiding Examiner: If there is nothing further, the pre-hearing conference is concluded.

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Stanley E. Sporseen

Direct Examination

By Mr. Cragun:

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27—Q. How do you determine annual charges by the sharing-the-net-benefits method?

A. In determining annual charges by the "sharing-the-net-benefits" method, I use the following criteria:

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(5) In hearings in connection with third unit rentals, it was ultimately accepted that the method referred to as "sharing-the-net-benefits" should be used to determine a fair annual charge for Kerr. In implementing this method, it was assumed the Tribes owned one-half of the power site since one-half of Flathead Lake is in the Flathead Reservation. By this line of reasoning the Tribal share in the net benefits would then be 25%. This is an erroneous assumption since the power plant and dam are entirely on Tribal lands, while the reservoir is approximately one-half on Tribal lands and one-half on other lands. In order to correct this error it is necessary to separate the project by some rational method into two parts.

I believe that a satisfactory method of determining relative values would be to base these values on firm power capacity for a plant at this site without storage, a plant with Flathead Lake storage, and the same plant with Hungry Horse storage available. Assuming 1964 as an

average year for the period 1959-69, critical period energy credited to Hungry Horse storage, Kerr storage and Kerr without storage has been determined. These results were

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determined by the same method as used by Columbia River Coordinating Committee and are 657, 251 and 161 MW Months, respectively. These figures are developed on Table 5 of Confederated Tribes Exhibit No. 1. Also shown on Table 5 are Kerr payments for Hungry Horse storage and payments for Kerr storage from downstream plants. Kerr storage should probably have some additional credit for re-regulation of releases from Hungry Horse, simplifying operation at Hungry Horse and daily and weekly pondage for Kerr power plant. I, therefore, have decided to multiply the Kerr storage factor by 1.5 and the three factors would then be 657, 376 and 161 respectively. The factors for Kerr storage and the hypothetical project without Kerr storage (Hungry Horse storage and Kerr without storage) would then be 376 and 818 or 31.5% and 68.5% respectively. Under this proposal, the Indian interest in the Kerr Project benefits as a whole would then be  $0.25 \times 0.315 + 0.50 \times 0.685 = 0.4213$  or 42.13%. Benefits accruing to Kerr Reservoir, such as payments for downstream benefits, would be shared on the basis used in the Third Unit proceedings, 25% to the Tribes.

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Stanley E. Sporseen

Cross-Examination

By Mr. McElwain:

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Q. What was erroneous about what—what was the erroneous assumption that the Commission and the Secretary



(221)

and the Court made in the Third Unit Proceeding that you refer to on line 9 of your testimony on page 9 of your answer to Question 27?

A. They decided the Tribes owned 25 percent of a project, the Kerr Project—or the project land.

Now, the only thing wherein they owned 50 percent, or where they only owned 50 percent is the reservoir itself which provides the storage for the Kerr Project. The Kerr Project could be built without any reservoir. It isn't necessary to have a reservoir to have a power plant. There are many of them without a reservoir.

Q. Yes, but not the Kerr Project that was constructed

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here?

A. No, I told you, I said here was a hypothetical project. I am using this method to determine the percentage value that the Indians had in the project—the percentage interest they had in the project.

. . . . .

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By Mr. McElwain:

Q. Now, in order that I have it: "I have therefore taken into account the power produced by a plant at Kerr without storage on Flathead Lake (Hungry Horse storage and Kerr without storage) and a plant including storage on Flathead Lake."

A. That is correct.

Q. In other words, the No. 2 plant that you are taking here does not include Hungry Horse storage?

A. That is correct.

Q. Okay.

Now let's see. You assign some megawatts capability to these various situations that you have referred to in your

testimony back on page 9 and page 10, in answer to Question 27, is that right?

A. That is right.

Q. And to a presumed Kerr Project without any storage, either from your Flathead Lake or from Hungry Horse, you have assigned 161 megawatts?

A. That is correct.

Q. And this is a plant which would not utilize any non-Indian lands?

A. That is correct.

Q. Would that plan have the same head as the present Kerr plant?

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A. No.

Q. No?

A. No, it wouldn't.

Q. Would it be capable of getting 161 megawatts then?

A. Well, that is the figure I use, I will take a look at it.

Q. You have 10-foot less head.

A. 10-feet less head.

Q. And you have said—

A. Go ahead.

Q. Go ahead. I will wait.

A. Yes, I accept that as reasonable.

Q. You would get the same 161 out of it yet?

A. Yes.

Q. What difference would the 10 feet less head make then?

A. Ten feet of head, oh, I can't tell you right here at the moment. You take 10 feet of head on that would be 16, you would add 10 feet to it, you should have—now you are confusing me.

Q. No, I'm not. I'm trying to get straightened out myself.

(230)

Presiding Examiner: Do you have the answer there? If you have, maybe he will take it subject to check.

Mr. McElwain: I do not have the answer.

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By Mr. McElwain:

Q. The 161 megawatts you are using here is based upon the operation of Kerr with the 10-foot head, is it not—the 10-foot additional head with the storage there. That comes from your—

A. I didn't—actually we are getting into a realm here in which I didn't do any computation.

Q. There would be a difference in the head, and it would make some difference in what your calculations are here, is that correct?

A. No, it wouldn't make any difference in it, because I didn't use it that way. I used the coordinating agreement figures to arrive at the value of this thing, rather than try to confuse it as I said before. I didn't go to another project with a lower head on it.

Q. Those figures are based upon Flathead Lake with storage, isn't that right—Flathead Lake as it is, not as you have assumed it?

A. That is correct, yes.

Q. And there is in your assumption a plant that has a 10-foot less head than the source of your 161 gave to Kerr, isn't that right?

A. Yes, we can take off about 6 percent less than that, I would say.

Q. Okay.

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Your second plant is a Kerr plant with Flathead Lake storage.

A. Correct.

Q. And that is a plant that has the actual head that the 161 megawatts was figured on, for your Kerr alone, without storage?

A. That is correct.

Q. That is correct?

A. Yes.

Q. And you have taken and assigned to what amounts to that 10 feet of storage in Flathead Lake, which is about 1,217,000 acre-feet, a factor—well, first, it has 251 megawatts of capability?

A. That is correct.

Q. Through the plant as constructed.

A. That is correct.

Q. And you have assumed that it has some regulating abilities for Hungry Horse water releases, is that correct?

A. That is correct.

Q. And by reason of that you have given it an assignment of 1.5 factor?

A. That is correct, yes.

Q. And so that gives the—

A. I think I said, reregulation of Hungry Horse, and other additional benefits which you might get from that

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storage. There are other things such as pondage for Kerr, and such other things. But one happens to be Hungry Horse storage regulation. It has considerable value, that I didn't think the coordinating agreement gave all the value to, so I gave it an additional amount multiplying it by  $1\frac{1}{2}$ .

Q. Yes, and that came up with a capacity factor, or a capacity that you used here of how many megawatts?

A. 376.

Q. 376?

A. I think, isn't it—yes.

Q. That is a figure that actually comes just from your computation and assignment of 1.5 factor to that particular storage, right?

A. Yes, I just used a different factor.

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Q. That figure does not come from any of the exhibits which you have?

A. That is correct.

Q. Now, the total capability of that plant, then, as you have assigned it, would be 161 megawatts from the Kerr by itself, plus 376 megawatts which is Kerr plus the storage, with the storage at the 1.5 factor—

A. That is correct.

Q. —and that plant would have a capability, then, of 531 megawatts?

A. Right.

. . . . .

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Q. And you have used Hungry Horse storage as something that the Indians are entitled to participate in anything that is derived from it by 50 percent, isn't that correct?

A. That is correct.

Q. Now, do the Indians own any of the lands upon which Hungry Horse is located?

A. They don't own any of it.

Q. Do the Indians own any of the power facilities of Hungry Horse?

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A. Not at all.

Q. Do the Indians have any interest in Hungry Horse, whatsoever?

A. Do they have any interest in it now? No.

Q. It is a Government-owned plant?

A. Government-owned plant, which they sell—

Q. And it is located on the Flathead River above—

A. That is correct.

Q. —the Kerr Project?

A. That is correct.

Q. And the Government makes releases from that project sometimes, and it runs down through the Kerr Project and when the water goes through the Kerr Project it generates capacity, electricity?

A. Yes.

Q. As it goes through?

A. That is correct.

Q. Are you familiar with Section 10(e) of the Federal Power Act, which requires payments to the United States Government or an owner of a facility that furnishes such water benefits to a lower facility?

A. Correct, yes.

Q. Do the Indians make any payments to the Federal Government by reason of the use of the waters of Hungry Horse Reservoir or its storage?

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A. Oh, no. They do not.

Q. And yet you have them participating in all of the 50 percent of any benefit that would come from that storage, right?

A. That is correct.

Q. Is there anywhere that you have them participating in any of the charges that are connected with the cost of that storage?

A. The figure I used here was 1964—these figures of 356, 378, 161, the 1964 Coordinating Agreement amounts, not the 276, that is multiplied by  $1\frac{1}{2}$ —I figured that at  $1\frac{1}{2}$  and got the 376—251, then I multiplied that by  $1\frac{1}{2}$  to get 376. That year I think the payment was \$180,000 for Hungry Horse storage.

That is an operating cost, of course, I don't know what it would include, but anyway, it is paid for by the Project itself.

Q. Is that the reason you have not included it here?

(237)

A. That is correct. It is a part of the project cost—a part of the project operating cost.

Q. Well, if it is a part of the project operating cost, shouldn't it be included in your Exhibit 1, Chart 7, Table 7?

A. I suppose it should be. This was supplied to me by Montana Power Company, and apparently does not include either the Indian rentals or the payments to the—

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Q. Yes, those figures were supplied at your request, is that not right?

A. Yes.

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Q. Isn't it a fact that the amount of energy that you get out of a plant has no relationship to its construction costs. That actually construction costs of a hydroelectric project is based upon its capacity, rather than its energy?

A. Yes. No, no, that is not right.

I would have to have—in other words, I would have to have—in order to get the energy out of this plant, I have to have a higher dam. Either one of the two of them has to be higher to get the same amount of energy. You have the same amount of water, you would have to build a higher dam.



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You couldn't get the energy out of there otherwise. If you are going on your assumption you could get energy out of here one year of 980,000 and another year one million, why, of course, there wouldn't be any difference in cost. But if you have a dam on a stream with a certain amount of water in it, if you are going to get the energy out, you have to have the head, before you can get the energy.

Q. In order to get the head, you have got to have—

A. A higher dam.

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Q. Just with respect to your exhibits, I just have one other question on Table 6. You have that labeled "Headwater Benefits Study", 1964, with Buffalo Rapids added.

A. Yes.

Q. That is not a study under Section 10-F of the Federal Power Act?

A. Well, it is just like it says there, it is a study under that Federal Power Act with Buffalo Rapids added. I made these computations here myself, by adding it in here. I just added in and divided up the costs. You will notice that the costs on Kerr I think is different, because I took 45,000 here on Table 5, and 42,000 on there, because you divide the thing up differently, you see, in accordance with the formula.

Q. Yes, but these aren't based on 10-F headwater benefit payments. This is based upon coordination under the coordination agreement entered into by the utilities and Bonneville Power?

A. That is correct.

Q. Non-Federals, out in the area?

A. All of them, yes.

Q. And—

A. The coordination agreement.

Q. Yes. And that coordination agreement furnishes considerable benefits, doesn't it, by reason of its electrical coordination that has absolutely nothing to do with Kerr or Kerr storage as such?

A. Oh, yes, of course, it has all the rest of them in there, too.

Q. And those electrical benefits, by reason—gained by reason of the coordination agreement, rather than mere headwater benefits, are included in your figures in this exhibit, Exhibit 1, Table 6, are they not?

A. Everything that is included in the coordinating agreement is in there, yes.

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Q. I want to go through with you the steps by which you derive the 25 percent and see if I understand how you arrived at it.

Now, first, did you allow 50 percent of the benefits to the developer of the reservoir?

I will give you the next step. Let's say the next step is this: Did you give 50 percent of the benefits to the developer of the reservoir and then allow a 50 percent share to ownership of the reservoir, is that what you did?

A. That is it, yes.

Q. Since you found the ownership of the reservoir equally divided, you took the ownership share and divided that equally, is that right?

A. That is correct.

Q. And that is how we come up with the 25 percent share, is that correct?

A. That is correct.

Q. In other words, what we are doing is, we are taking a unit of production, we are allowing 50 percent to the developer, 50 percent to ownership—right?

A. That is correct, yes.

Q. —and then you are dividing the ownership share according to how it is held?

A. Yes.

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Stanley E. Sporseen

**Cross-Examination**

**By Mr. Sander:**

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**By Mr. Sander:**

Q. When you plan and design a project you make economic studies?

A. Yes.

Q. Do those economic studies include the lands you have to acquire for the project?

A. Oh, yes, reservoir lands—generally speaking, the reservoir lands. Of course, land for a dam site, too. You have to consider the value of those lands, yes.

However, I might point out, I think we should clarify this, I don't make appraisals of those lands.

Q. I understand that.

A. Usually we have appraisers that take care of that.

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Q. I am talking now strictly from the point of view of planning and designing; this function is what we are talking about.

A. Yes.

Q. You have spoken about flood control, irrigation and hydroelectric, and just so we are clear what we are talking about, would you give me for the record the distinguishing physical characteristics of these three types of projects? How do they differ from each other?

A. They don't necessarily differ from each other.

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They are dams, usually. All of them are considered dams that I worked on—they are largely dams. They don't differ too much. A flood control project might never have a hydroelectric plant in it, only a dam, outlet works, and spillway. The irrigation dam part of it, the dam part of it would be the same sort of project possibly, possibly a multiple-purpose project with all three involved in it too. Many of these are multiple-purpose projects.

Q. So the distinguishing feature then is the hydroelectric project might have a powerhouse, whereas the other ones might not?

A. That is true. A hydroelectric project might never have a dam with it at all. That is another thing.

Q. That would be a run-of-the-river project?

A. Yes, or some of them we have a hole bored in the bottom of a lake and discharging into another lake below, with a tunnel between them. We have one, that is, one of them that I built.

Q. Then as you have described it to me, a run-of-the-river project may not involve as much land and planning and designing as a hydroelectric project with a reservoir.

A. That is right. That is true, yes.

Q. Because of the nature of storage, you have to have

more land to serve the purpose for which that project is designed?

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A. Yes.

Q. Now, when you are making your economic studies of these various kinds of projects, you have to consider some kind of evaluation for the land in determining your economics, do you not?

A. Yes.

Q. Do you necessarily assign a different value to lands that are occupied by, say, the dam or the reservoir, spillway, switchyard, or do you give the same value to all the land?

A. Well, they appraise the lands, and it makes no difference what they are building on it, the appraisal of the land itself would still be at the same value.

Q. At the same value. Even though they served different—these parts served different purposes?

A. They don't affect the value of the land, I don't think, generally speaking.

Q. Now, when you come to the matter of designing a project, let's take a hydroelectric project with storage, you have to design one part, the spillway, the penstocks, the powerhouse, all in conjunction with relation to the other parts, don't you?

A. That is correct.

Q. In other words, if a bunch of engineers got together in designing a project and didn't communicate with one another, you might not get a very good project, is that right?

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A. That is quite right.

Q. Would you say that kind of planning and designing would be erroneous?

(272)

A. I would think so, yes.

Q. I would think so, too.

So when you do your planning and designing of a hydroelectric project with storage, you have to consider it as an integral unit, don't you?

A. The whole thing can be considered together, certainly.

Q. Let's look at Project 5 a little closer. In response to Question 15-A on your amended testimony, you were asked to describe Project 5.

I note that you describe it: "Kerr Dam Project of the Montana Power Company is located on the Flathead River below Flathead Lake, Montana."

I am interested in noting that you speak of Hungry Horse Reservoir, but you make no mention of a reservoir in terms of the Kerr Dam Project. Now, does the license for Project No. 5 include a reservoir?

A. Yes.

Q. What is that reservoir?

A. That reservoir is Flathead Lake.

Q. That is Flathead Lake?

A. Yes.

Q. If you were to draw the shortest line possible

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between the Kerr Dam and the powerhouse, how long would it be?

A. Kerr Dam and the powerhouse?

Q. Yes.

A. I think it is about a quarter of a mile, if you draw a straight line through there. I don't remember exactly whether it is 1500 feet.

Q. At least there is a distance, is there not?

A. There is a distance in there.

Q. What lies between them?

A. A tunnel—three tunnels, in fact.

Q. The tunnel goes through rock?

A. Rock formation, yes.

Q. Physically they are not integrated then, are they, as they are in some other dams we have a dam and powerhouse—

A. You mean they are not together?

Q. Yes.

A. Oh, no.

Q. Do you know how much draw-down the license allows for Project No. 5?

A. It allows a fluctuation of 10 feet.

Q. Ten feet?

A. It is roughly 10 feet, anyway, in the lake level.

Q. This draw-down then is regulated and maintained by the dam, is that right?

A. That is correct, yes.

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Q. In other words, then, the reservoir is operated by the dam, is it not, as an integral unit?

A. That is correct.

Q. Then, from an operational point of view it would be physically possible to operate the dam and the reservoir without the powerhouse, wouldn't it, as you might a storage or irrigation project?

A. Oh, yes.

Q. You couldn't operate the powerhouse without the dam either, could you?

A. Not the way it is designed, no.

Q. So actually, from an operational point of view, the dam and powerhouse are an integral unit too, aren't they?

A. That is right.

Q. In other words, when you look at it from an operational point of view, the reservoir, the dam, and the powerhouse, Project No. 5, are an integral unit, aren't they?

A. That is right, yes.

Q. Then we do come to this, do we not, that if you con-



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sidered Project No. 5 from a planning point of view, from a design point of view, or from an operational point of view, you would look at it as one integral unit, wouldn't you?

A. Yes, I would say that is correct.

Q. And if the Commission in its decision on the Third Unit were looking at Project No. 5 from that point of view,

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would you then say it had engaged in an erroneous assumption?

A. From that point of view?

Q. Yes, from that point of view.

A. No, not at all.

Q. In other words, we get to the point then that if you consider Project No. 5 as one integral unit, then you would share it in the same manner as you—in your direct testimony—would share the reservoir itself?

A. Under that assumption, that is correct.

Q. Under that assumption?

A. That is correct.

Q. In other words, 50 percent for development, 50 percent for ownership?

A. Roughly, yes. That would be correct.

Q. Then you would divide the ownership shares again according to how they were owned?

A. Yes.

Q. I have one more question.

In your calculations yesterday you were talking about operating Kerr as a run-of-the-river plant in one of your comparisons.

A. Yes.

Q. Now, you also mentioned that you have read the Scattergood Report.

A. No, I didn't.

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Q. You didn't?

A. No. I read parts of it.

Q. Parts of it? Did you read the part where the Corps of Engineers back in 1930 concluded the run-of-the-river plant there would be uneconomic?

A. No, I didn't read that.

. . . . .

Chester E. Mohler

Cross-Examination

By Mr. McElwain:

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A. Well, there are two answers to that really. If I had attempted to reflect those early years in the figure that I use on this table, I may have had a somewhat different answer, or different figure than I have in this table. I did not attempt to do that. Not having attempted to do that, then whether the figure in the Commission's order, or whether the figure as recommended by Bonneville, were to be used, was not material to the answer I came up with, because it did not reflect those years in the figure for head-water benefits that I used. I took only the figure for December 1, 1964.

Q. And the figure you have used here is the figure based upon a contract between a number of private utilities and non-federal public utilities, and the Bonneville Power Administration known as the Pacific Northwest Coordination Agreement; is that not true?

A. That is true.

Q. And does not that agreement envision and embody coordination electrically as well as hydraulically?

A. It does.

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Q. And some of the benefits accruing from that agreement are by reason of Montana's complete electric facilities and system, and its electric connections, and has no direct relation to the hydraulic operation of the Kerr project?

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A. I am sorry, there is something there I didn't get. Could you repeat the question, please?

Presiding Examiner: Read it back.

(Question read.)

The Witness: My difficulty there is your use of the word "benefits." I am not just exactly sure what you mean by that. There are benefits that are considered in this agreement. Benefits of various sorts. One of the benefits is storage, the downstream generation from headwater storage, but there are many other benefits that are considered in the agreement as well.

The agreement, of course, is an overall agreement which considers all the benefits involved. Storage benefits are only one of the many benefits concerned.

By Mr. McElwain:

Q. And the payments set forth on your sheet H-2 reflect those total benefits?

A. No, I believe not. The payments on Sheet H-2 reflect the storage benefits, but they reflect the storage benefit which is realized under conditions of coordination.

Q. Which include the electric coordination of the properties?

A. Among other things, yes.

Q. Without it, this figure would not be the same?

(443)

A. If there were no coordination contract, and payments of this sort were to be derived, undoubtedly the payments

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would be a different amount.

• • • • •

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Melwood W. Van Scoyoc

was called as a witness and, having been first duly sworn,  
WAS

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examined and testified as follows:

Direct Examination

By Mr. Cragun:

• • • • •

Q. Have you read the testimony filed in this case in your name?

A. Yes, sir.

Q. If asked the questions therein, would your answers in response be as shown?

A. They would subject to certain corrections which I desire to make.

Q. Will you state what those corrections are?

A. The first correction is on page 8, Question 16, the second line of the answer, after the word "of" before "License" insert the word "the", and after the word "License" insert the words "issued for Project".

The next correction is on page 11, the third line of Answer 22, change the word "year" to "years".

**(443)**

On page 12, the fourth line, after the figure "30" insert "(d)".

On page 15, in Question 32, the fourth line, strike the word "investment" and insert the word "income" in lieu thereof. And strike the word "credit" in that line.

On page 23, the second line, change the word "column"

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to "columns"; insert after the figure "(2)" the words "and (3)".

Page 29, the seventh line of the answer, after the word "schedule" insert the word "which"; in the next line after the word "and" insert the words "the revenue".

Page 41, the answer to Question 71, the sixth line, change the word "most" to "more".

Page 47, the answer to Question 82, fourth line, change the figure "14" to "13".

Page 58, the third line, add "s" to the word "amount".

Page 60, the fifth line, change the word "charge" to "income".

Page 62, Answer to Question 112, fifth line, change the figure "158,000" to "168,000"; in the next line change the figure "301,994" to "301,940".

Page 66, answer to Question 115, sixth line, change "1938" to "1958".

Page 68, answer to Question 117, fourth line, after the word "site" insert the words "under actual water conditions."

• • • • •

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**Prepared Testimony of Melwood W. Van Scoyoc**

18—Q. In your opinion, would the fact that the owner of the hydroelectric plant is a public utility affect the commercial value of the plant?

A. Yes, where a hydroelectric plant is owned by a public utility the commercial value of the plant is affected by the factor of regulation, either State or Federal, or both, which have as their aim the limitation of profits to a reasonable level.

19—Q. Would this limitation on the commercial value of the hydroelectric plant be applicable only if such plant were devoted to public service?

A. Yes. In answering your previous question I had assumed that such plant was a used and useful public-utility facility.

20—Q. What is your understanding of the term "profitable purpose" as applied to a hydroelectric generating plant?

A. In rate regulation, generally, there can be no such thing as a "profit"; the law guarantees merely the opportunity to earn a reasonable return. As a result, I conclude that the provision of Article 30(d)

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of the license and of the regulation it incorporates, is not talking of the usual concept—for if there were no "profit" there would be no payment to the Indians whatever, which is clearly not the intention either of Section 10(e) of the Federal Power Act or Article 30(d) of the license. As a result, a "profitable purpose" which the license and the regulations refer to must either be profitability of the Kerr operation compared with alternatives available—the approach which the Commission took in connection with the third-unit proceeding—or it must relate to what revenue the Montana Power Company receives for the energy and capacity of the Kerr Plant in comparison with its costs associated with that energy and capacity, including in the latter a reasonable return on the net investment of the Company in Kerr Plant.

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21—Q. Is Montana Power Company a public utility subject to rate regulation by State and Federal authorities?

A. Yes. As to its intrastate rates, they are subject to the jurisdiction of the Montana Public Service Commission. As to the interstate wholesale rates of the Company, they are subject to the jurisdiction of the Federal Power Commission.

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22—Q. Would you outline the approach you followed in determining the commercial value of Kerr hydroelectric plant?

A. Basically the approach which I used to determine the commercial value of the plant involved, (1) a determination for each of the years 1958-1964 of the share of the total electric revenue of the Company reasonably attributable to the power and energy produced by Kerr hydroelectric plant, and (2) a determination of the cost of producing such power and energy by Kerr hydroelectric plant, including a reasonable rate of return on the production facilities of such plant. The cost of producing power and energy from Kerr Plant, including a reasonable return on the net investment of the Company in the physical facilities used to produce power and energy is deducted from the revenue amounts to determine the annual income applicable to the Kerr Plant power site.

Inasmuch as the Confederated Tribes and the Montana Power Company each owns or controls a portion of the lands and flowage rights which make possible the development of Kerr project, it is necessary and appropriate to divide such annual income applicable to the power site between the Tribes and the Company on a reasonable basis. The share of such annual income allocated

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to the Tribes would, in my opinion, represent the reasonable readjusted annual charge payable to the United States



Government as trustee for the Tribes pursuant to the requirements of Article 30(d) of the Kerr Project License and the provisions of the Federal Power Act.

23—Q. Based upon the use of your approach, what is the amount of the readjusted annual charge for the 10-year period commencing August 1, 1958, which you recommend?

A. I recommend that the readjusted annual charge be fixed at \$1,300,000.

24—Q. Does your determination of the readjusted annual charge pertain to all three units at Kerr hydroelectric plant?

A. Yes, it does. I have been advised by counsel that my determination should be made on this basis.

25—Q. Will you explain how you proceeded to determine the share of the electric revenue of the Company attributable to the power and energy produced by the Kerr hydroelectric plant of Montana Power Company?

A. First, I determined the earnings which the Company had experienced over a period of years from its investment in electric utility facilities including Kerr hydroelectric plant. This is set forth on Confederated

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Tribes Exhibit No. 5.

26—Q. Who prepared that exhibit?

A. This exhibit was prepared by me and under my supervision and direction.

27—Q. Does this exhibit contain the schedules to which you referred showing the earnings of Montana Power Company?

A. Yes, it does. Schedule No. 6, consisting of two pages, sets forth such information.

28—Q. Will you turn to Sheet 1 of this schedule and explain what is shown thereon?

A. Sheet No. 1 of the schedule shows the rate of return earned by Montana Power Company on a net-investment

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rate base for each of the years 1949 through 1964. The items which go to make up the net-investment rate base amounts in column (10) are set forth in the preceding numbered columns (2) through (9). The amounts set forth in such columns for the years 1949 through 1964 represent average amounts based on the beginning and end of year balances. The amounts in column (11) reflect operating income of the Company and the percentages in column (12) reflect the earned rates of return on the rate base amounts in column (10). The operating income amounts in column (11) are detailed on Sheet 2 of this schedule.

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29—Q. Will you turn to Sheet 2 and explain what is shown thereon?

A. This sheet shows the detail of the operating income for each year. In column (2) is shown the revenue of the Company from the sale of electricity for each of the years 1949 through 1964. In the succeeding columns (3) through (10), are shown the revenue deduction items. The miscellaneous operating revenue amounts in column (10) are credit amounts. The total revenue deduction amounts for each year are shown in column (11) and these amounts are deducted from the amounts in column (2) to obtain the operating income amounts in column (12).

30—Q. What was the source of information set forth on Sheets 1 and 2?

A. The reports of Montana Power Company to the Federal Power Commission, FPC Form No. 1, Exhibit B by reference.

31—Q. Inasmuch as the Kerr hydroelectric plant became operational in 1938 why have you not shown the rates of return earned on the net investment rate base of the Company prior to 1949?

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A. It was my intention to do so but I found that the reports of the Company to the Federal Power Commission for the years 1938 through 1947 did not contain

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a breakdown of all revenue deduction items between utility departments. Montana Power Company has other utility operations besides its electric utility department. Thus, it was not feasible for me to include data showing the Company's earnings prior to 1949. Therefore, it was necessary to limit the period to the ten years prior to end of the first twenty years of operation under the license.

32—Q. Please explain what is referred to respecting the amounts shown for accumulated deferred income taxes in column (9) of Sheet 1 and also the amounts for deferred income tax shown in Column (8) of Sheet 2 of Schedule 6.

A. The amounts in both columns reflect a combination of the tax deferments arising from the use of deductions for accelerated amortization and liberalized depreciation that are available under the Internal Revenue Code. The amounts for accelerated amortization pertain to the Cochran Hydroelectric Plant for which the Company obtained a Necessity Certificate permitting it to amortize \$6,582,808.76 of the cost of this project over a five year period for income tax purposes. This amortization commenced August 1, 1958. The annual amortization amounts are included within the amounts shown in column (8) of Sheet No. 2 of the schedule, while the

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average balances are reflected in the figures shown in column (9) on Sheet No. 1 of the schedule.

Montana Power Company has also taken advantage of the liberalized depreciation tax deductions available under Section 167 of the Internal Revenue Code. However,

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prior to the year 1960 the Company used what is known as the "flow through" method and Federal income taxes were not deferred during the period 1954-1959 inclusive. In 1960 the Company changed from the "flow through" method to the "Normalization" method and commenced to account for deferred Federal income taxes. This change was made pursuant to an order of the Public Service Commission of Montana dated December 28, 1960. The Company made the change retroactive to January 1, 1955 and transferred from Earned Surplus to Account 266.2 Liberalized Depreciation, Accumulated Deferred Taxes on Income, the sum of \$1,134,860. Therefore, the amounts shown on Sheets 1 and 2 of this schedule for the years 1955 through 1959 reflect retroactive application of the "normalization" method of accounting for liberalized depreciation tax deductions.

The Federal Power Commission in *Alabama-Tennessee Natural Gas Company*, Opinion No. 417, issued February 3, 1964, announced a policy whereunder the tax deductions available for liberalized depreciation would be utilized in determining the income tax allowance in

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rate determinations. Therefore, I have adjusted the Company's reported provision for deferred income tax for the year 1964 to correspond with the Federal Power Commission's policy. The Commission announced that such policy would not be made retroactive, thus I did not adjust the deferred income tax provisions and the accumulated, deferred tax balances for the prior years.

33—Q. After you determined the earnings which the Company experienced for the years 1949 through 1964, what was the next step in the procedure you followed to determine the commercial value of Kerr hydroelectric plant?

A. The next step was to determine the operating income of the electric utility department of the Company on a functional basis. By that I mean a determination of the operating income of (1) the power supply function, (2) the transmission function and (3) the distribution function. This involved first a determination of the rate base amounts applicable to each function. The rate base for each of the years 1958-1964 in total and as determined for each of the functions is shown on Schedule No. 5, consisting of seven sheets, one for each year. The total rate base for each such year is also shown on Schedule No. 6, Sheet 1.

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34—Q. Why did you confine your functional determinations to the years 1958-1964 inclusive in view of the longer period shown on Schedule No. 6, Sheet 1.

A. This is the period of years with which we are particularly concerned for readjustment of the annual charges of Kerr hydroelectric plant.

35—Q. Will you turn to Schedule No. 5, Sheet 1, and explain what is shown thereon?

A. Sheet 1 of Schedule No. 5, pertains to the year 1958. The items which go to make up the rate base are listed in column (1). The balances for plant, accumulated depreciation, amortization and other items as of the beginning and end of year are shown respectively in columns (2) and (3). The average of the two is shown in column (4). The average amounts in column (4) were assigned or allocated to the functions set forth in column (5) Steam Production, column (6) Hydraulic Production, column (7) Transmission and column (8) Distribution. While a number of the rate base items are directly assignable to one of these four functions, allocation of other items was required.

36—Q. What do you mean by "assigned"?

A. By "assigned" I mean that certain amounts in column 4 apply in their entirety to a single

function. For example, Steam Production Plant was assigned entirely to the steam-production function.

37—Q. What do you mean by "allocated to functions"?

A. Certain items of plant are applicable to more than one of the four functions. Therefore, it is necessary to allocate these plant items using appropriate allocation bases. For example, "General Plant", shown on line 8, is applicable to each function, and is allocated to the various functions proportionately on a basis for allocation which I will subsequently explain.

38—Q. What is the first item for which an allocation was necessary?

A. The first item is Intangible Plant which consists of Organization Expense, Franchises and Miscellaneous Intangible Capital. The major portion of this item pertains to Kerr hydroelectric plant and was allocated between the Kerr plant hydraulic and transmission functions. The amount applicable to Franchises was assigned directly to Distribution. The balance representing Organization Expense was allocated between functions based on tangible plant assignments. General Plant shown on line 8 was allocated on the basis of tangible plant.

The item on line 16, Accumulated Depreciation and Amortization applicable to General Plant, was allocated to functions based on the General Plant allocation on line 8. The items on line 19, Customers Advance for Construction and line 20, Contributions in Aid of Construction, were assigned entirely to the distribution function. The item on line 22, Accumulated Deferred Income Taxes, Accelerated Amortization, was assigned directly to hydraulic production. I previously testified that this item pertained solely to the Cochrane hydroelectric plant. The

item on line 23, Accumulated Deferred Income Taxes, Liberalized Depreciation, was allocated between functions based on the accumulated gross plant additions after exclusion of the portion of the Cochrane hydroelectric plant subject to Accelerated Amortization.

Inasmuch as the income-tax credit on line 30 exceeded the total computed amount for working capital, no allowance for working capital was included in the rate base. In connection with the items on line 27, Prepayments, and line 28, Materials and Supplies, it was necessary to separate and allocate such items between the Electric Department and total Company.

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39—Q. Would your explanation be the same with respect to the rate base amounts for each of the other years 1959 through 1964?

A. Yes, except that the years 1962, 1963 and 1964 include an additional rate base item, Accumulated Deferred Investment Tax Credit. This item is shown on line 25 of Sheet 5 of Schedule 5. The average amount of \$75,000 was allocated to functions on the basis of the gross plant additions for the year 1962. The average for each succeeding year was allocated on the basis of the gross plant additions for that year.

40—Q. Were the items Customers Advances for Construction, Contributions in Aid of Construction, Accumulated Deferred Income Taxes and Accumulated Deferred Investment Tax Credit deducted from the Net Plant amounts in your determination of the total base and the rate base for each of the four functions?

A. Yes, they were.

41—Q. What standards have you applied in determining the rate base amounts?

A. I have applied the standards of the Federal Power Commission as they have been set out in its decision in



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rate proceedings involving electric utilities with the exception of the item for Accumulated

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Deferred Income Taxes, Accelerated Amortization. The Commission's initial position with respect to the rate-making treatment of this item was to make no deduction from the rate base therefor. Subsequently, it made an adjustment for this item in the rate of return through the allowance of a rate of return of 1.5% on the capital represented by the amount of Accumulated Deferred Income Taxes, Accelerated Amortization.

In connection with the *Alabama-Tennessee Natural Gas Co.* case involving liberalized depreciation to which I have already referred, the Commission deducted the accumulated deferred income taxes applicable to liberalized depreciation in determining the rate base. The matter has not subsequently been the subject of Commission determination although this issue is involved in a proceeding presently in progress before the Federal Power Commission. I see no difference which in principle would justify the rate base treatment of the accumulated deferred income taxes resulting from accelerated amortization any differently from the accumulated deferred income taxes resulting from liberalized depreciation. Accordingly, I have deducted the Accumulated Deferred Income Taxes, Accelerated Amortization balance pertaining to the Cochrane hydroelectric plant in determining the rate base of the Company.

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42—Q. What is the source of the amounts in columns (2) and (3) of this sheet and the other sheets of this schedule?

A. FPC Form No. 1 of Montana Power Company.

43—Q. What was the next step in your determination of the Operating Income of the Company by functions?

A. This step is shown on Schedule 4 which consists of seven sheets showing the Operating Income for each of the years 1958 through 1964. The total Operating Income amounts are also shown on Schedule 6, Sheet 2.

44—Q. Will you turn to Sheet 1 of Schedule No. 4 and explain what is shown thereon?

A. Sheet 1 of Schedule No. 4 pertains to the year 1958. In column (1) is shown Revenue From the Sales of Electricity, the various Revenue Deduction items and Operating Income. In column (2) is shown the total amounts for the electric utility department of the Company which are either assigned or allocated to the functions shown in columns (3) through (7). In column (8) is shown a total of the amounts in column (6) and column (7). The first item involving an allocation is Administrative and General Expense on line 12. These expenses were allocated on the basis of all other operating expenses,

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excluding purchased power and the Indian rental payment amounts. The item on line 19, Depreciation Expense, General Plant, was allocated on the basis of the General Plant amounts shown on Sheet 1 of Schedule No. 5.

The Social Security and Unemployment Tax amount on line 22 was allocated to functions on the basis of labor. The Property Tax item on line 23 was allocated on the basis of the respective functional rate bases as shown on Sheet 1 of Schedule No. 5. The Franchise tax item on line 25 and the Corporation License tax on line 26 were also allocated to functions based on such respective rate base amounts. The Telephone and Telegraph tax on line 28 was allocated on the basis of Administrative and General Expenses, line 12. The same allocation method was employed with respect to the Stamp tax item on line 30.

The Federal Income tax on line 33 was allocated to functions on the basis of the functional rate base amounts shown on Sheet 1 of Schedule No. 5. The provision for

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Deferred Income Tax, Liberalized Depreciation, on line 38 was allocated to functions on the basis of the accumulated gross additions for the years 1954 through 1958. The assignment and allocation of Other Operating Revenue on line 30 involved a study of the various items

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reported by the Company as Rents from Electric Property and Miscellaneous Electric Revenues. These assignments and allocations were made from the information available in FPC Form No. 1 filed by the Company.

45—Q. What was the source of the amounts in column (2) of Sheet 1 of this Schedule?

A. These amounts were all taken from various schedules in FPC Form No. 1. I previously testified in connection with Schedule No. 6 that certain retroactive adjustments had been made for the Provision for Deferred Income Taxes, Liberalized Depreciation.

46—Q. I believe you explained the basis of the allocation to functions of all items on this schedule with the exception of Operating Income on line 42. Will you explain how you allocated Operating Income?

A. The total Operating Income amount for the Electric Utility Department was allocated to functions on the basis of the respective rate base amounts shown on Sheet 1 of Schedule No. 6.

47—Q. What is included in the item on line 6, Other Power Supply Costs?

A. The principal item included therein is the cost of purchased power. Also included is other power supply expense.

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48—Q. Would the answers you have given with respect to Schedule No. 1 be appropriate for Sheets 2 through 7 of Schedule No. 4?

A. Yes, they would, with the exception that on Sheet 2 of the schedule, line 26, Taxes Other Than Income Taxes, an item for Capital Stock appears. This item which appears only in 1959 was allocated to functions on the basis of the respective rate base amounts on Sheet 2 of Schedule No. 5. In addition, as I already mentioned with respect to Schedule No. 5, the investment tax credit amounts appear only in the years 1962, 1963 and 1964. The total amount for each year was allocated to functions on the basis of the respective gross plant additions for such year. I should also call attention to the fact that for the year 1964 no amount appears for Provision for Deferred Income Taxes, Liberalized Depreciation, for the reason which I previously gave in connection with my explanation of Schedule No. 6.

49—Q. Have you concluded your explanation of Schedule No. 4?

A. Yes, sir.

50&Q. Please explain how you used the information shown on Schedule No. 4 to determine the revenue amount applicable to the power-supply function?

A. This was done by deducting the cost of transmission and distribution from the total revenue from sales of electricity. This is shown on Sheet 4 of Schedule No. 2.

51—Q. Please turn to that sheet and explain what is shown thereon.

A. On line 1 of Sheet 4 is shown the total revenue from sales of electricity for each of the years 1958 through 1964. The various items of transmission and distribution cost which were taken from Schedule No. 4 are shown on lines 3 through 10. Total transmission and distribution costs are shown on line 11. On line 12 is shown the revenue

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amounts applicable to power supply which is the difference between the amounts on line 1 and line 11.

52—Q. I see you have included under Transmission and Distribution costs on line 10 an item of Return for each of the seven years. How did you determine these amounts and what is the basis of including return as a part of Transmission and Distribution costs?

A. The amounts shown for Return were determined by the allocation made of Operating Income on Schedule No. 4, which I previously explained. These amounts represent the pro rata portion of the Company's total Operating Income for each year which is applicable to the Transmission and Distribution

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functions. The basic assumption, which I believe is reasonable under the circumstances, is that each dollar of the Company's net investment rate base earns the same amount of return. This assumption has been adopted in connection with the determinations which have been made for the establishment of Amortization Reserves under Section 10(d) of the Federal Power Act. These return amounts vary by years as they are derived from the application of Transmission and Distribution function rate base amounts shown on Schedule No. 5 and the rates of return shown on Schedule No. 6, Sheet 1.

53—Q. Why is it necessary to determine the revenue of the Company applicable to the Power Supply function in this manner?

A. For the reason that virtually none of the revenue received by the Company from the sale of electricity is sold at the generating plant bus bar. The bulk of the sale of electricity is made from the Company's distribution system, although some major sales are made from high

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voltage transmission facilities. Therefore, it is necessary to make a determination of the revenue of the Company applicable to the Power Supply function by process of deduction.

54—Q. Is it possible to relate the dollars of revenue applicable to the Power Supply function

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to the quantum of capacity and energy supplied to the transmission and distribution facilities by the power supply system of the Company?

A. No. It is not possible to determine precisely what share of the total revenue of the Company from sales of electricity reflects charges for capacity and what share reflects charges for energy, consequently there is no way to know the exact portions of the revenue applicable to Power Supply as shown on line 12 of this schedule which actually represent the revenue from the sale of capacity and the revenue from the sale of energy. However, we do know that the revenue which the Company receives from its sales of electricity are derived from sales of both energy and capacity.

Both energy and capacity are important ingredients in the design of electric rate schedules. Some rate schedules incorporate separate charges for capacity, which are usually called demand charges. This is particularly true of sales made for resale and larger industrial sales. The Company has several rate schedules of this type. However, the block type rates generally used for residential service and also for commercial service have built into them charges for capacity through the use of the higher kilowatt hour prices in the initial and subsequent

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consumption blocks of the rate, although all charges in the rate schedule are stated in terms of kilowatt hour prices.

(475)

55—Q. How then did you determine what portion of the total revenue applicable to the Power Supply function is attributable to Kerr hydroelectric plant?

A. It was necessary to allocate the total Power Supply revenue for each year between Kerr plant and the other power supply resources of the Company. I made four allocations for this purpose. Two of these allocations established the outer limits. These two allocations are shown on Sheet 1 of Schedule No. 2.

56—Q. Please turn to Sheet 1 of Schedule No. 2 and explain what is shown thereon.

A. This schedule is divided into two parts, Section A and Section B. Section A reflects an assignment of the Power Supply revenue to Kerr plant on the basis of kilowatts of demand. For the purpose of this allocation it is assumed that all Power Supply revenues are derived from the sale of capacity. The revenue amounts on line 2 are those which were determined on Schedule No. 4. On line 3 are set forth for each year the maximum system demands in kilowatts. These

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values were taken from Sheet 6 of Schedule No. 4, which I will subsequently explain. The annual revenue per kilowatt shown on line 4 is derived by dividing the revenue amounts on line 2 by the kilowatts of demands shown on line 3.

The contribution made by Kerr plant toward satisfying the system demand at the hour of the system peak is shown on line 5. The source of the kilowatt demands on line 5 is FPC Form No. 12 of the Company for the respective years. The annual revenue amounts applicable to Kerr plant on line 6 were derived by multiplying the unit revenue per kilowatt on line 4 by the Kerr plant kilowatts of demand shown on line 5.



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On line 7 is shown the Kerr plant annual cost, including a 6% return on the plant net investment, but excluding annual charges, headwater benefit payments and revenues. The source of the amounts shown on this line will be subsequently explained. The annual income amounts applicable to the Kerr power site are shown on line 8. The Indian Tribes' share is shown on line 9 and, as indicated, is 57.3% of the total annual income applicable to the power site.

57—Q. Please state how you derived the Indian Tribes' share of the income applicable to Kerr power site.

A. This percentage was derived from data showing the megawatt months of generation possible at

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Kerr plant during the critical water period. These basic data are shown in Confederated Tribes' Exhibit No. 1, Table 5.

Kerr plant is capable of 161 megawatts months of generation for natural stream flow. Flathead Lake storage provides additional generation of 251 megawatt months. Upstream storage at Hungry Horse reservoir, owned by the Federal government, makes possible an additional 657 megawatt months of generation. Thus, the critical period generation totals 1,069 megawatt months.

Since the Indian Tribes own all of the land on which the Kerr dam and power house are situated, they are entitled, in my opinion, to 100% of the Kerr power site value resulting from natural stream flow. I am aware that in the earliest consideration of Indian annual charges there was discussion of dividing the benefits or values between the Tribes and the public; the latter sharing through regulation of Montana Power Company's rates; but here the public has already got its share, such as the State Public Utilities Commission has allowed, and the balance of the power-site value belongs to the Tribes.

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The Indian Tribes have title to approximately one-half of Flathead Lake and Montana Power Company either

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owns or controls the lands and flowage rights of the other half of Flathead Lake. Accordingly, the power site value resulting from the use of Flathead Lake for storage should be divided, in my opinion, equally between the Tribes and the Company. The balance of the Kerr power site value is derived from upstream storage at Hungry Horse reservoir. The cost of such storage is allocated to downstream plants on the basis of the benefits derived at such plants from the storage of water in Hungry Horse reservoir pursuant to Section 10(f) of the Federal Power Act. Thus headwater benefit costs are assessed by the Federal government to Montana Power Company for its Kerr project and its Thompson Falls project, the latter being located downstream from Kerr plant. A determination of the downstream storage charges was made in Federal Power Commission Docket No. E-6384. The Montana Power Company reports in its FPC Form No. 1 the following headwater benefit payments:

1963	Unappropriated Earned Surplus (Account 216)	\$260,800.00
	Water for Power (Account 536)	196,000.01
	Total	<u>\$456,800.01</u>
1964	Unappropriated Earned Surplus (Account 216)	\$137,100.00
	Water for Power (Account 536)	196,468.00
	Total	<u>\$563,568.00</u>

It is not possible to ascertain from the information reported in FPC Form No. 1 whether such payments pertain only to the

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Kerr project or to both Kerr project and the Thompson Falls plant of the Company or the particular years to which the payments charged to Unappropriated Earned Surplus apply. I was not successful in reconciling these reported payments with those set out on pages 64 and 65 of the transcript of this proceeding, or with the payments reflected on Exhibit S-7 of the Secretary of the Interior.

58—Q. Has the Company received payments from downstream nonfederal owners of hydroelectric plants which were benefited by the storage provided in Flathead Lake reservoir?

A. Yes.

59—Q. What are the amounts of such payments?

A. The amounts of money credited to Miscellaneous Revenues of the Company for such storage payments are as follows:

1959	\$ 4,300
1961	42,971
1962	75,200
1963	133,462
1964	157,467
	<hr/>
	\$413,400

In addition, the Company in 1963, credit Unappropriated Earned Surplus (Account 216) for headwater benefits payments it received in the amount of \$97,866.66. No information is available in FPC Form No. 1 concerning the

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various years to which such credit to surplus applies.

60—Q. Have you given any consideration to payments for downstream benefits by Federal installations in the form of energy under the Pacific Northwest Coordination Agreement?

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A. No, I have no familiarity with the particular arrangement, although I understand some such payments in that form are made to the Company.

61—Q. What effect would such arrangement have on your computations?

A. Any such payments, would to the extent of half the value thereof, increase the Indian Tribes' share of the Kerr power site value based on Flathead Lake storage.

62—Q. Does Flathead Lake reservoir provide storage benefits to the Company's Thompson Falls plant?

A. Yes, it should.

63—Q. How did you divide the Kerr power site value attributable to Hungry Horse storage between the Indian Tribes and the Company?

A. I divided it equally between the Indian Tribes and the Company.

64—Q. Why did you divide it 50-50?

A. It is my opinion that the additional power site value provided by Hungry Horse storage should

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be divided on the same basis as the storage provided by Flathead Lake. It is true that Hungry Horse storage would have increased the critical period generation of Kerr plant even if it be assumed that such plant was only a run-of-river plant; and on this basis the Indians would be entitled to 100%. On the other hand, the Company is required to make payments to the United States Government for the upstream storage provided by Hungry Horse reservoir and thus the argument can be made that the Company is therefore entitled to all of the benefits available by reason of such payments, although it should be borne in mind that this is an expense of the Company charged to operation and hence, recoverable through rates. Another factor to be considered is the payments to which the Company is entitled by reason of the storage provided

by Flathead Lake reservoir which benefits downstream plants. One half of such payments should inure to the benefit of the Indian Tribes because of their ownership of approximately one-half of Flathead Lake. Based on information presently available, it appears that the benefits provided by Flathead Lake storage to the downstream plants exceed the payments which Montana Power Company must make for the Hungry Horse storage benefits it received.

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A more precise division of the Kerr power site value attributable to Hungry Horse storage could be made if complete data were available as to the Kerr plant headwater benefit payments and revenues. My study of the situation led me to the conclusion that under the circumstances of not being able to take the headwater benefit payments and revenues into consideration for the reasons stated, the most reasonable division of the power-site value resulting from the Hungry Horse storage benefits would be to divide such value on the same basis I used for the value derived from Flathead Lake storage.

The derivation of the percentage of 57.53% is as follows:

	MW Months		Indian Tribes Share		
Kerr Plant Site	161	X	1.00	=	161.0
Flathead Lake	251	X	.50	=	125.5
Hungry Horse	657	X	.50	=	328.5
	<u>1069</u>				<u>615.0</u>
	615				
	<u>1069</u>	=	.5753		

65—Q. If you had not given any consideration to Hungry Horse storage what would be the Indian Tribes' share of the annual income applicable to the Kerr power site?

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A. The Indian Tribes' share would be 69.54% derived as follows:

	MW Months		Indian Tribes Share		
Kerr Plant Site	161	X	1.00	=	161.0
Flathead Lake	251	X	.50	=	125.5
	<u>412</u>				<u>286.5</u>
	286.5				
	<u>412</u>	=	.6954		

66—Q. Will you please direct your attention to Section B of Sheet 1 of Schedule No. 2 and explain the second allocation which you made of the revenue applicable to power supply?

A. For the purpose of this allocation it was assumed that all power supply revenues were derived from the sale of energy. The revenue amounts applicable to power supply on line 11 are the same amounts as shown on line 2 of this Sheet.

On line 12 is shown the annual energy in megawatt hours. These figures were taken from Sheet 5 of Schedule No. 2 and will be explained subsequently. The annual revenue per megawatt hour is shown on line 13 and was derived by dividing the dollar amounts on line 11 by the annual energy amounts on line 12. On line 14 is shown the Kerr plant output in megawatt hours. The source of these figures is also FPC Form No. 12 of the Company for each year. The annual revenue

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applicable to Kerr plant on line 15 is calculated by multiplying the annual revenue per megawatt hour on line 13 by the Kerr plant output in megawatt hours on line 14.

The Kerr plant annual costs are deducted on line 16 to determine the annual income applicable to the Kerr power site shown on line 17. The Indian Tribes' share, 57.53% is shown on line 18.

67—Q. How does the Indian Tribes' share determined on a kilowatt demand basis compare with the Indian Tribes' share determined on the basis of megawatt hours?

A. The Tribes' share on a kilowatt demand basis for the seven years is \$9,140,928 or an average of \$1,305,847 per year. On the basis of megawatt hours, the Indian Tribes' share is \$7,805,932, or an average of \$1,115,133 a year.

68—Q. Do the amounts you just stated reflect the limits on the basis of the two assumptions you made that all Power Supply revenues represented either sales of capacity or sales of energy?

A. Yes, they do. Since it is obvious that the revenues attributable to Power Supply reflect the sale of both capacity and energy, the correct amount of annual income applicable to the Kerr power site must lie somewhere between these two limit amounts. On Sheet

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2 of Schedule No. 2 there is set forth an allocation based on dividing the revenue applicable to power supply equally between capacity and energy.

69—Q. Will you turn to Sheet 2 of Schedule No. 2 and explain what is shown thereon?

A. The format of this sheet is similar to Sheet 1. On line 2 is shown the revenue applicable to Power Supply in the same amounts as shown on Sheet 1. The maximum system demand in kilowatts and the annual energy in megawatt hours is shown on lines 3 and 4 respectively. The total revenue amounts applicable to Power Supply on line 2 were divided 50% to demand and 50% to energy as shown on lines 5 and 6. The unit demand revenue per kilo-

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watt shown on line 7 was derived by dividing the dollar amounts on line 5 by the maximum system demand values on line 3. Likewise, the unit energy revenue per megawatt hour on line 8 was derived by dividing the energy revenue amount on line 6 by the annual energy amounts on line 4.

The Kerr plant demand and system peak is shown on line 9 and the Kerr plant output in megawatt hours on line 10. The Kerr plant demand revenue on line 11 is derived by multiplying the unit demand revenue per

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kilowatt on line 7 by the Kerr plant demand at system peak on line 9. Similarly the Kerr plant energy revenue on line 12 is derived by multiplying the unit energy revenue on line 8 by the Kerr plant output in megawatt hours on line 10. The total revenue applicable to the Kerr plant is shown on line 13. From this revenue amount the Kerr plant annual costs on line 14 were deducted, resulting in the annual income amounts applicable to Kerr power site on line 15. The Indian Tribes' share, 57.53% is shown on line 16.

70—Q. What is the total Indian Tribes' share for the seven-year period and the average annual amount?

A. The total Tribes' share is \$8,473,473 which is an average of \$1,210,491 per annum for the seven years.

71—Q. What is the basis for dividing the total revenue equally between demand and energy?

A. We know that capacity and energy are the two most important revenue factors in the design of electric rates. A third factor usually given consideration in rate design, particularly for residential and commercial service, is customer costs. These costs are more closely related to capacity or readiness-to-serve costs than they are to energy costs.

As I testified earlier, it is not possible to ascertain what portion of the revenue of the Company



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is derived from each factor. In the absence of such knowledge, I believe it reasonable to give equal weight to the capacity and energy factors. In a somewhat analogous situation involving the allocation of fixed costs in *Atlantic Seaboard Corporation*, the Federal Power Commission divided such costs equally between demand and volume. The reason given by the Commission was that both capacity and volume were significant factors, that neither greatly predominated and that since the division of total fixed costs between the two factors was not susceptible to mathematical determination, it was their judgment that such costs should be divided equally.

72—Q. Will you describe the fourth allocation method which you utilized?

A. Yes. It is set forth on Sheet 3 of Schedule No. 2 and involves the assignment to Kerr plant of the Power Supply revenue on the basis of average annual energy and excess demand.

73—Q. Will you explain what you mean by average annual energy?

A. Average annual energy represents the value in kilowatts which, if maintained for every hour of the year, would equal the annual energy kilowatt hour amount.

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74—Q. What do you mean by excess demand?

A. The excess demand is the difference between the maximum system demand and the average annual energy in kilowatts.

75—Q. Will you proceed with your explanation of Sheet 3?

A. The annual revenue amounts applicable to Power Supply is shown on line 2 and these are the same amounts as shown for this item on Sheets 1 and 2 of this schedule.

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The annual energy in megawatt hours is shown on line 3 and on line 4 is shown the average annual energy in kilowatts. These amounts were derived by dividing the annual energy on line 3 by the number of hours in the year. Thus, if for the year 1958 the average energy of 3,788,876 megawatts had been utilized at an equal hourly rate throughout the year, the demand amount would be 432,520 kilowatts.

The maximum system demands in kilowatts is shown on line 5 and the excess demand in kilowatts on line 6. The latter amounts were obtained by subtracting the kilowatt values on line 4 from the maximum system demands on line 5. The demand revenue amounts on line 7 and the energy revenue amounts on line 8 were derived by prorating the total revenue amounts on line 2 between demand and energy on the basis of ratios derived from relating the kilowatt

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amounts on lines 4 and 6 to the maximum system demand values on line 5. The unit demand revenue per kilowatt on line 9 is derived by dividing the demand revenue on line 7 by the maximum system demands on line 5. Similarly, the unit energy revenue per megawatt hour on line 10 is derived by dividing the energy revenue amounts on line 8 by the annual energy on line 3.

The Kerr plant demand at the time of the system peak and the Kerr plant output in megawatt hours are shown on lines 11 and 12. On lines 13 and 14 are shown the Kerr plant demand and energy revenue amounts for each year, which were determined by multiplying the unit demand and energy revenue amounts by the Kerr plant demands and outputs. The total revenue for Kerr plant is shown on line 15. From this is deducted the Kerr plant annual costs on line 16. The resulting annual income amounts applicable to the Kerr power site are shown on line

17. The Indian Tribes' share, 57.53%, is shown on line 18.

76—Q. What is the Tribes' share of the total annual income in excess of all costs including a reasonable rate of return, applicable to the Kerr power site and the average annual amount?

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A. The total revenue amount is \$8,278,491 and the average for the seven year period is \$1,182,642.

77—Q. What led you to make this allocation on the basis of average annual energy and excess demand?

A. This allocation procedure was adopted from a method of allocation known as the "average and excess" method which has had acceptance in connection with the allocation of capacity costs of electric systems. This method gives consideration to load factor and assigns as energy revenue that portion of the revenue applicable to Power Supply which is equal to the product of the system load factor and the total revenue applicable to Power Supply. The balance of the revenue is assigned to demand. I believe this approach is logical because it takes into consideration both the system load factor and the load factor at which Kerr plant has operated during the seven-year period. These respective load factors are as follows:

Year	System	Kerr Plant
1958	68.3%	38.4%
1959	62.1	50.6
1960	68.5	54.0
1961	63.6	60.5
1962	63.2	58.2
1963	60.3	51.3
1964	68.4	63.2
Average	63.91	53.74

78—Q. What is the source of these percentages?

A. They were derived from information contained in FPC Form Nos. 1 and 12.

79—Q. I believe you were to explain the source of certain demand and energy amounts set forth on Sheets 1, 2 and 3 of Schedule No. 2. Will you now do so?

A. Yes. The first item, line 3 of Sheets 1 and 2, and on line 5 of Sheet 3, pertains to the maximum system demands for the years 1958-1964, inclusive. These demand amounts are taken from Sheet 6 of this Schedule.

80—Q. Please refer to Sheet 6 of Schedule No. 2 and explain what is shown thereon?

A. This schedule shows the maximum demands on Montana Power Company's system for the year 1958-1964, inclusive, and the source of supply for the peak hour. On line 1 is shown the date and hour of the system peak load. On line 2 is shown the one-hour system peak load excluding deliveries to other power systems. The deliveries to other systems on a net basis are shown on lines 4 through 9. The total system demand is shown on line 10.

81—Q. What do you mean by the word "net" on line 3?

A. In several instances the Company delivered energy to another system and received energy

from the same system during the peak hour. For the purpose of this determination of maximum demand, I netted the receipts and deliveries during the peak hour for such other system. For example, in 1958 during the peak hour the Company delivered power to Utah Power & Light Company at the rate of 1000 kilowatts and received power at the same rate of 1000 kilowatts from such system. Also for the 1958 peak hour the Company received power at the rate of 17,000 kilowatts from U.S. Bureau of Reclamation at Fort Peck and simultaneously delivered power at the rate of 21,000 kilowatts to that system. These amounts were netted and the net amount of 4000 kilowatts is shown on line 9.

82—Q. Please continue with your explanation of Sheet 6?

A. On lines 12 through 20 are shown the sources of the system supply at the hour of the system peak. This supply consisting of steam and hydraulic generation shown on lines 12 and 13 plus the power received from other systems during the hour of system peak load. It will be noted that the total demands on the system in kilowatts for each year on line 10 are the same as the kilowatts of demand shown on line 21 for total supply to system.

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83—Q. What is the source of the system electric-energy amounts set forth?

A. These energy amounts were taken from Sheet 5 of Schedule No. 2.

84—Q. Please refer to Sheet 5 of this schedule and explain what is shown thereon?

A. Sheet 5 shows the amount of energy generated, purchased and interchanged for each of the years 1958 through 1964, inclusive. The amount generated in the Company's steam plant and in its hydroelectric plants is shown on lines 2 and 3 respectively. The energy purchased from other systems is shown on lines 6, 7 and 8. On line 10 is shown the amount of energy interchanged with other systems on a net basis. On line 11 is shown the amounts of energy received by Montana Power Company for providing transmission service; this is also shown on a net basis. The total energy is shown on line 12 and these amounts are reflected on Sheets 2 and 3 of Schedule No. 2.

85—Q. Will you proceed to explain the details of the Kerr plant costs which in total are shown on Sheets 1, 2 and 3 of Schedule No. 2.

A. With the exception of three of the cost-of-service items, the Kerr plant cost amounts

were taken from Schedule No. 3. The three items are Return, Federal Income taxes and the Montana Corporation License taxes, the latter being included under Taxes Other Than Income.

86—Q. Will you explain what is shown on Schedule No. 3?

A. The upper part of this schedule, lines 1 through 14, reflects the cost of service of Kerr hydraulic generation for each of the years 1958-1964 inclusive. The lower portion of the schedule, lines 16 through 30, reflects the average net investment for the hydraulic-generation function for each of such years. As noted in the heading of this schedule, the cost of service is based on a 6% rate of return and excludes the annual charge amounts and headwater-benefit payments.

87—Q. Please state why you found it necessary to make adjustments for the items of Return, Federal Income Taxes, and Montana Corporation License Taxes?

A. Inasmuch as the Kerr plant investment includes the costs incurred by Montana Power Company in acquiring lands and flowage rights which were necessary for the use of Flathead Lake as a storage reservoir, it

was my opinion that the cost of these lands and rights should be excluded from the Kerr plant costs in determining the power-site value of Kerr plant. If this adjustment were not made, the Company would benefit twice for its share of the Kerr power-site value—once through the allowance of a return on the investment made by the Company in lands and flowage rights—and again through its prorata share of the computed power-site value stemming from Flathead Lake storage.

88—Q. What adjustments were made to eliminate this duplication?

A. For each of the years 1958-1964, inclusive, I reduced the Kerr plant cost of service shown on line 14 of Schedule No. 3. The adjustment amounts which follow represent a return of 6% on the amounts shown for Account 320—Land and Land Rights on line 18 of Schedule No. 3 plus the associated Federal income and Montana Corporation License taxes.

1958	\$29,015	1962	\$36,942
1959	29,047	1963	36,518
1960	32,755	1964	35,435
1961	34,924		

89—Q. Were allocations necessary of any of the cost items listed on lines 3 through 13 of Schedule No. 3?

A. Yes. Allocations were necessary because Project No. 5 includes transmission facilities

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and it was necessary to allocate certain cost items which were common to both generation and transmission. In addition, it was necessary to make allocations of certain cost items which were not assigned directly to Kerr plant throughout this period of years.

90—Q. Will you state which cost items shown on Schedule No. 3 reflect the use of allocations and state the allocation basis you used?

A. The first item requiring allocation is Administrative and General Expense on line 7. While the Company made certain direct assignments of Administrative and General Expense to Project No. 5, I was of the opinion that there should be allocated to Kerr project a portion of the Company's total Administrative and General Expense. Thus the amounts shown on line 7 reflect an allocated portion of the Company's total Administrative and General Expense. The method of allocation was the same as that used with respect to allocating total Administrative and Gen-

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eral Expense to functions as described in my testimony with respect to Schedule No. 4, namely on the basis of other operating expenses excluding purchased power and annual charges applicable to Kerr project.

The Depreciation amounts on line 9 reflect the allocation of depreciation charges on General Plant to Hydraulic Generation. This allocation was made on

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the basis of the General Plant gross investment amount allocated to Hydraulic Generation and is shown on lines 25, 26 and 27 of this sheet.

Certain tax amounts included under Taxes Other Than Income on line 10 were assigned directly by the Company to Project No. 5. For the years 1958-1960, inclusive, direct assignments were made by the Company for Real Estate and Personal Property taxes, Federal Old Age, Federal Unemployment and State Unemployment taxes. However, when the Federal Power Commission adopted FPC Form No. 9, effective January 1, 1961, as the Licensed Project Annual Report, data as to Taxes Other Than Income was no longer required to be reported. Therefore, upon request, the Company furnished the amounts for Real Estate and Personal Property taxes for the years 1961-1964, inclusive. The Company was unable to furnish similar information with respect to the Federal Old Age, Federal Unemployment and State Unemployment taxes and it was therefore necessary for me to estimate these tax amounts for the years 1961-1964, inclusive. This was done by using operating and maintenance expense as the allocation basis for prorating a portion of the total cost of these items to Kerr Project.

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After determination of the tax amounts applicable to the total Kerr Licensed Project, it was necessary to allo-



cate the tax items between Hydraulic Generation and Transmission. Real Estate and Personal Property Taxes were allocated on the basis of net investment. Federal Old Age, Federal Unemployment and State Unemployment Taxes were allocated on the basis of operating and maintenance expenses.

In addition to the taxes directly assigned, I allocated to Kerr plant on appropriate bases a portion of certain minor tax costs, such as franchise, telephone and telegraph and stamp taxes. Two additional tax items are included under Taxes Other Than Income. One is the Capital Stock tax which appears only in the year 1959. A portion of such tax was allocated to Kerr Hydraulic Generation. The Montana Corporation license tax is a tax based on taxable income and it was allocated on the same basis as the Federal income tax. The latter amount, shown on line 11, is a computed tax amount based on the use of a 6% rate of return on average net investment.

The item of Miscellaneous Revenue, shown on line 12, represents minor rentals received from the use of Kerr project property. All of such amounts were assigned to Hydraulic Generation.

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91—Q. Do I correctly understand you to say that the amounts shown for return on average net investment, line 13, are based on the application of a 6% rate of return to the average net investment amounts shown on line 30 of this schedule?

A. Yes, sir.

92—Q. Why did you use a rate of return of 6%?

A. I used a 6% rate of return because I believe it is a reasonable rate of return to use for the purpose of this proceeding. It corresponds to the rate of return which the Federal Power Commission has used for its recent determinations of just and reasonable rates under

the Federal Power Act. These rate-of-return determinations were made in *Wisconsin-Michigan Power Company*, Opinion No. 432 and *Southwestern Public Service Company*, Opinion No. 451. I examined the capital structures of these two electric utilities, the cost of the debt and preferred stock capital which they had experienced and the allowance which the Commission made for common equity capital and made comparisons thereof with the capital structure and the costs of capital experienced by Montana Power Company. In my judgment, the differences in capital structure and

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capital costs are not sufficient to warrant the belief that were the Federal Power Commission to determine the fair rate of return of the Company for the period 1958-1964 that it would have arrived at a rate of return different than 6%.

93—Q. In connection with your study did you also investigate the specified reasonable rate of return which would be applied to the actual legitimate investment of the Company in Kerr project for the purpose of establishing amortization reserves after the first twenty years of operation of the project pursuant to Article 34 of the License?

A. Yes, I did.

94—Q. Did you ascertain the specified reasonable rate of return for each of the years 1958-1964, inclusive, based upon the standard stated in Article 34 of the License and Paragraphs B and C of Federal Power Commission Regulation 17?

A. Yes, sir.

95—Q. In exercising your judgment as to the rate of return you would use in determining the cost of service of Kerr plant for the purpose of determining the readjusted annual charge, did you give consideration to these specified reasonable rates of return?

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A. Yes, I did.

96—Q. Will you state the specified reasonable rates of return as you determined them as of the beginning of each year?

A. The specified reasonable rates of return are as follows:

1958	4.63%	1962	4.93%
1959	4.78	1963	5.03
1960	4.93	1964	5.05
1961	4.93		

97—Q. How were these specified reasonable rates of return determined?

A. Under Article 34 of the License and Regulation 17 the specified reasonable rate of return is one and one-half times the weighted average interest rate payable on the par value of the bona fide interest-bearing debt of the Licensee actually outstanding at the beginning of the period of amortization and of each calendar year thereafter. I determined the average par value and net proceeds of the Company's interest-bearing debt at the first of each of the years 1958 through 1964, and the annual interest expense and amortization of debt discount and premium for each year. These latter amounts were related to the average of the par value and net proceeds to obtain the weighted average annual interest rates for each year. These rates were multiplied by 1.5 to obtain the specified reasonable rates of return which I have listed.

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97a—Q. Did you also give consideration to the rate of return which the Montana Public Service Commission found to be just and reasonable in its decision dated June 23, 1958, authorizing Montana Power Company to increase its

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rates and charges for electric service with respect to which you have previously testified?

A. Yes, I did.

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98—Q. What rate of return did the Montana Public Service Commission find to be just and reasonable?

A. 5.33%.

99—Q. To what was this rate of return applied?

A. To a fair value rate base of \$207,700,000.

100—Q. What is the resulting return amount?

A. It is \$11,070,410.

101—Q. If this sum were related to the original cost less depreciation also determined by Montana Public Service Commission, what would be the resulting rate of return?

A. The rate of return would be 8% based on the Company's December 31, 1958 original cost less depreciation valuation of \$138,381,775, as adjusted by the Montana Commission.

102—Q. In examining the cost of service items assigned or allocated to Kerr Hydraulic Generation on Schedule No. 3, I note the absence of any amounts for the Investment Tax Credit and Provision for Deferred Income Taxes although such items appear on Schedule No. 4 which reflects the Operating Income of the Company by functions. Will you explain the reason for such items not being included on Schedule No. 3?

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A. Yes. The plant additions to Kerr Hydraulic Plant during this period are minor as can be seen from an examination of the amount on lines 16 through 27 of Schedule No. 3. Therefore, the items for Investment Tax Credit and Provision for Deferred Income Taxes would be so insignificant that, as a practical matter, I did not consider their calculation warranted.

103—Q. Will you explain how you determined the average net investment amounts set forth on lines 16 through 28 of Schedule No. 3?

A. The Federal Power Commission issued an Order on July 23, 1964 (32 FPC 235) making a determination of the actual legitimate original cost of the Kerr Project as of December 31, 1959. The Commission had previously issued an Order on March 31, 1948 (7 FPC 528) determining the actual legitimate original cost of Project 5 as of December 31, 1940. The Company recorded on its books in 1964 the adjustments necessary to conform its licensed project plant accounts to the Commission's Order of July 23, 1964, and reported such adjusted year-end balances in its Licensed Project Annual Report, FPC Form No. 9. However, it was necessary to apply the recorded 1964 adjustments to the years to

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which the adjustment applied in order to obtain the correct balance at the end of each year. Therefore, an examination was made of the FPC staff audit papers for the purpose of securing information concerning the various 1964 adjustment items. This was accomplished and adjusted plant balances prepared. The adjusted plant balances at the beginning and end of each year were averaged and the averages are reflected on lines 16 through 28 of Schedule No. 3.

104—Q. What is the source of the Accumulated Provision for Depreciation amounts on line 29 of Schedule No. 3?

A. These amounts were obtained from the Licensed Project section of FPC Form No. 1 and from FPC Form No. 9 and in certain instances adjustments were necessary because of the adjustments to plant, to which I previously referred. The amounts on line 29 reflect the average of the beginning and year-end adjusted balances of the Accumulated Provision for Depreciation.

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105—Q. Have you completed your explanation as to all matters involving Schedules 2 and 3?

A. Yes.

106—Q. On Schedule No. 2 you set forth four determinations of the Indian Tribes' share of the annual income applicable to Kerr power site. Do I correctly

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understand from your prior testimony that, in your opinion, the method which you described as the "average and excess," method represents the most reasonable and logical allocation basis for determining the annual income amount of the four determinations which you made?

A. Yes, that is correct, although I would consider the 50-50 allocation which I made to be a reasonable and logical method.

107—Q. Would you again refer to Sheet 3 of Schedule No. 2 which shows the derivation of the annual income amounts based on the "average and excess" method. I note that the Indian Tribes' share of the annual amounts on line 18 vary from a low of \$700,070 in 1958 to a high of \$1,434,528 for the year 1961. What is responsible for the wide swing in the annual income amounts on Sheet 3?

A. In the main these differences are due to water conditions which affect the annual generation at Kerr plant. You will note from the figures on line 12 that net generation at Kerr in 1958 amounted to 649,277 megawatt hours compared with 1,028,915 megawatt hours in 1961. Kerr plant energy revenue for 1958 as shown on line 14 is \$1,734,284, compared with \$2,844,024 for the year 1961. Kerr net generation in 1964 was 1,065,614 megawatt hours, the highest of the seven years. The

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energy revenue for this year is \$2,978,071 which is also the highest of the seven years. However, the demand revenue

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for 1964 was the lowest for the seven years due to the Kerr plant demand at the peak hour being only 121,300 kilowatts. I do not know the reason why Kerr generation was at such a low level during the peak hour. It is possible that a "forced outage" existed at the time of the system peak as to one of the three generating units.

108—Q. If Kerr plant at the peak load period had been operating on the same basis as in prior years, what would have been the demand revenue for 1964?

A. On the basis of using 180,000 kilowatts which is the plant capability normally available at the time of the system peak, the demand revenue would have been \$1,398,000. This would have made the total revenue for the year \$4,376,071.

109—Q. What is the potential annual net generation at Kerr plant under normal or median water conditions?

A. 1,060,000 megawatt hours according to the Company FPC report No. 12 for the year 1960.

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110—Q. To what extent, if at all, did 1964 generation exceed this amount?

A. By 5,614 megawatt hours.

111—Q. Based on your knowledge and experience concerning the power resources of electric utility systems and your study in this case of the power system of Montana Power Company, to what extent would you consider the Kerr hydroelectric plant a very important or valuable power resource of the Company?

A. Kerr plant is by far the most important single power resource of the Company and it is extremely valuable as a power-producing facility.

112—Q. Would you state why you believe Kerr plant is the most important single power resource of the Company?

A. Kerr plant is the largest single generating plant in the Company's system and supplies a large portion of the system's dependable capacity and energy output. The plant

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has an installed capacity of 168,000 kilowatts compared with installed capacity totalling 301,940 kilowatts for the Company's 12 other hydroelectric plants and the 66,000 kilowatts of installed steam plant capacity. The next largest hydroelectric plants of Montana Power Company, in terms of installed capacity, are the Cochrane and Ryan plants, both having 48,000 kilowatts of installed capacity.

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The net plant capability of Kerr plant normally available at the time of the system peak is 180,000 kilowatts compared with the total capability under similar conditions of 350,000 kilowatts for the Company's other 13 plants. Under most adverse water conditions, Kerr plant has a capability of 175,000 kilowatts compared with a total capability of 251,900 kilowatts under such conditions for the Company's other 13 hydro plants. Thus, Kerr plant has approximately 41% of the total net plant capability of the Company's hydroelectric plants under most adverse conditions, although it represents only 35.75% of the total installed capacity.

I previously gave the estimated potential output of Kerr hydroelectric plant under median water conditions as 1,060,000 megawatt hours which is 32.05% of the total potential output of all the Company's hydroelectric plants of 3,307,615 megawatt hours. This latter figure is approximate since it was necessary to estimate the average generation for two of the Company's small hydroelectric plants since the Company does not report their potential generation under median water conditions. During the years 1958 through 1964 the total net generation of Kerr plant was 6,356,506 megawatt

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hours which represents 30.53% of the total net generation of all of the Company's hydroelectric plants. The per-



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centage relationships year-by-year of Kerr plant output to total system generation and other percentage relationships are shown on Schedule No. 7.

113—Q. Will you turn to Schedule No. 7 and explain what is shown thereon?

A. The top portion of the Schedule shows for each of the years 1958 through 1964 the percentage relationship between Kerr plant output and (1) Total Net Generation on line 2; (2) Net Generation and Purchases on line 3, and (3) Hydro Net Generation on line 4.

The Lower half of the schedule shows what Kerr plant provided in percent of (1) Total Net Plant Capability on line 6; (2) in percent of Hydro Net Plant Capability on line 7, and (3) in percent of Net Plant Demand at Time of System Peak on line 8. I believe the figures which I have given and also the percentages set forth on Schedule No. 6 demonstrate the important position which Kerr hydroelectric plant has in the aggregate power resources available to the Company.

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Kerr plant is also a low cost hydroelectric generating plant, both in terms of plant capability and annual output. Its average net investment cost in 1964 is \$13,479,392. Based on a plant capability of 175,000 kilowatts under most adverse water conditions, the investment cost per kilowatt is only \$77. Based on an annual output of 1,060,000 megawatt hours under median water conditions and the annual cost for 1964 of \$1,908,031 shown on Schedule No. 3, the average cost is 1.8 mills per kilowatt hour. This cost would be increased by the annual charge payment and would also be affected by the net amount of headwater benefit payments and revenues applicable to Kerr plant.

114—Q. In your testimony you recommended that the readjusted annual charge be fixed at \$1,300,000 for the

(511)

ten-year period commencing August 1, 1958. Will you explain how you determined this amount?

A. This amount represents a judgment determination based upon the study which I made and with particular weight being given to the determination of the commercial value of Kerr power site using the "average-and-excess" method of allocating the Power Supply revenues to Kerr plant. I have shown on Schedule

**512**

No. 1 of Confederated Tribes Exhibit No. 5, the annual charge amounts representing the Indian Tribes' share of the power site value determined by the use of this method for each of the years 1958-1964, inclusive. I have also given consideration to the factor of normal water conditions as I believe this is necessary in order to achieve fairness and equity to both the Company and the Indian Tribes.

115—Q. Please turn to Schedule No. 1 and explain what is shown thereon?

A. The top portion of this schedule shows in column (1) the Annual Income Amounts taken from Sheet 3 of Schedule No. 2 of Exhibit No. 5 for the seven-year period, the total for the period and the annual average. Since the period for the readjusted annual charge commences August 1, 1958, the portion of the year prior to that date should be excluded. The amount in column (2) for the year 1958 reflects such adjustment.

The total net generation of Kerr plant for the six years and five-month period is 5,932,844 megawatt hours. This is an annual average of 924,598 megawatt hours. Compared with the net generation under median water conditions, there is an annual deficiency in net generation of 135,402 megawatt hours. The

**513**

Power Supply unit energy revenue amounts for the years 1958-1964 range from a low of \$2.5242 in 1963 to a high of

(514)

\$3.0126 in 1960. The weighted average Power Supply unit energy revenue for the period is \$2.748 per megawatt hour.

Applying this unit revenue amount to 1,060,000 megawatt hours produces energy revenue for Kerr plant of \$2,912,880 under normal water conditions.

The Power Supply unit demand revenue amounts range from a low of \$7.4103 in 1958 to a high of \$9.5476 per kilowatt in 1959, the weighted average being \$8.448. Kerr plant has a net capability of 180,000 kilowatts under normal conditions, at the time of system peak, although it has at times provided capacity to the extent of \$194,000 kilowatts. I believe it would be fair to use this stated capacity to compute the Power Supply demand revenue attributable to Kerr plant under normal conditions. Such amount is \$1,520,640.

The Kerr plant demand and energy revenue amounts, thus computed on the basis of normal conditions, and the total of these two amounts is shown on Schedule No. 1. After deducting from the total of \$4,433,520 the Kerr plant cost of service of \$1,924,293, which is an average for the seven-year period; the annual income

#### 514

applicable to the Kerr power site value is \$2,509,227. The Indian Tribes' share of 57.53% is \$1,443,558.

116—Q. Do you expect that normal water conditions will prevail during the remaining three years and seven months of the ten-year period with which we are concerned in this case?

A. No. It would be a remarkable coincidence if these years turned out to be normal water years. Water conditions during this period may be better than normal or they may be poorer than normal. Over a long term of years the overages and underages will average out.

117—Q. Under the circumstances here present, where we are dealing with a ten-year period and have actual data

(514)

for approximately two-thirds of such period, what weight would you give to the Company's experience under actual water conditions as compared with normal water conditions?

A. I believe that it would be reasonable to consider both, but I would give the greatest weight to the computed tribal share of the annual income applicable to the Kerr power site under actual water conditions. Under the circumstances, I believe weighting the two on a time basis would be fair. This computation provides an annual amount of \$1,296,891 which I would round up to \$1,300,000.

515

Therefore, I recommend that the readjusted annual charge payable to the United States Government as trustee of the Confederated Salish and Kootenai Tribes of the Flathead Reservation be fixed at \$1,300,000 for the ten-year period commencing August 1, 1958. This recommendation is subject to the qualifications I previously expressed concerning possible adjustment for headwater-benefit payments for upstream storage and revenues received from Flathead Lake storage benefits.

118—Q. What is the increase over the annual charge amount which Montana Power Company has paid during the period subsequent to August 1, 1958?

A. The payments made are at the annual rate of \$238,375, thus the additional payment on an annual basis would be \$1,061,625.

119—Q. Have you computed the annual income applicable to the share of the Kerr power-site value which would inure to the benefit of Montana Power Company under the annual payment schedule you propose?

A. Yes, it is \$862,975 based on the average power-site annual income shown on Sheet 3 of Schedule No. 2 with the year 1958 adjusted to a five-month basis.

120—Q. To what extent, if at all, is this sum of \$862,975 in addition to the 6% return which you accord the Company?

## 516

A. This amount represents the Company's share of the annual value of Kerr power site which flows from its ownership or control of approximately one-half of the Flathead Lake lands and flowage rights which are used for the Kerr Project, as developed under the license granted by the Federal Power Commission. It is in addition to the 6% earnings I impute to the Company on its net investment in Kerr hydroelectric plant, excluding its investment in lands and flowage rights which averaged some \$375,000 during the years 1958-1964.

121—Q. You have testified that the additional payment to be made by the Company under your recommendation of a total annual payment of \$1,300,000 would be \$1,061,625. For the period August 1, 1958, to December 31, 1964, what would be the total additional payment to be made on this basis?

A. \$6,469,074.

122—Q. If the Company paid this sum, to what extent, if at all, would it realize a saving of Federal income taxes?

A. Yes, the saving would be equal to 48% of such sum.

123—Q. What would be the remaining cash cost to the Company of making this additional payment?

## 517

A. It would be \$3,363,918.

124—Q. Based on the Company's making additional annual payments of \$1,061,625 for the balance of the ten-year period, what would be the annual cash cost to Montana Power Company?

A. After taking into account the Federal income-tax saving, the annual cash cost would be \$552,045.

125—Q. Is it correct that in addition to the saving in Federal income tax the Company would also have available a saving on its Montana Corporation-License tax?

(517)

A. Inasmuch as this tax is based on taxable income, I would assume such a saving would accrue to the Company. The Montana Corporation-License tax in recent years has approximated  $8\frac{2}{3}\%$  of the Federal income tax.

126—Q. On Sheet 1 of Schedule No. 6 of Confederated Tribes Exhibit No. 5, you show that in 1964 the Company earned a rate of return on a net-investment rate base of 11.19%. Assuming that in 1964 the Company had paid an annual charge of \$1,300,000 in lieu of the sum of \$238,375, what effect would it have on the rate of return earned for that year, assuming

**517A**

further that all other things remain the same?

A. The Company's operating income would have been reduced in the amount of \$552,645 and the resulting rate of return would have been 10.73%, a net reduction of 0.46%.

\* \* \* \* \*

**Melwood W. Van Scoyoc**

**Cross-Examination**

**By Mr. McElwain:**

**543**

Q. In that valuation what value have you put on those tribal lands?

A. In terms of an annual amount I have put a value of \$1,300,000.

Q. Yes, but that is the answer that you finally come up with, isn't it; it isn't from the commercial operation which includes the value of those lands, or did I misunderstand your statement?

A. The answer that I came up with of \$1,300,000 was determined by going through the process of determining

the commercial value of the Kerr hydroelectric plant and determining—

Q. Excluding the Indian lands, I take it?

A. No, including all elements which contribute to that value which include the tribal lands.

Q. Did you include the lands of the Montana Power Company acquired by them?

A. I treated the lands of Montana Power Company as an exclusion in determining the cost of Kerr Project for the purpose as explained in my testimony. However, the result of this process which I have gone through does provide a value to the lands of Montana Power Company substantially in excess of the cost thereof to Montana Power Company.

Q. And in a rate case, is it your understanding that the Montana Power Company on a wholesale rate case before the

544

Federal Power Commission would be allowed to earn a rate of return on value of the lands which the Montana Power Company has in this project?

A. I do not believe so.

Q. I don't believe so either.

A. I think the Federal Power Act would prohibit that. But that is not what we are doing here, determining the wholesale rates of Montana Power Company.

Q. That is your opinion, Mr. Van Scoyoc. As a matter of fact, my opinion is the Federal Power Act prohibits your use of this method, but we are not on opinions here at the moment. I would just like to have from you, please, what you have done.

In your analysis of commercial value have you considered the actual management and operation of the Montana Power Company in reaching your conclusions here?

(544)

A. I don't know what you mean by considering the management of the Montana Power Company.

Q. Isn't it a fact, Mr. Van Scoyoc, that management and the way it may operate has considerable to do with the operating expenses, the costs of service which you have included in your study?

A. Yes, to the extent that management has influenced the costs or revenues, they are given effect in my study.

Q. Isn't it a fact that different management may have

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had a completely different cost of service from the study which you have made here?

A. You mean if some other management than Montana Power Company management—their management might have resulted in different costs?

Q. Yes.

A. Why, I think that would follow in general. Of course, there are some limitations. I don't know whether you are suggesting another management would come in and supplant the present management with the system as it is today or whether you are thinking of a different management back 30 years ago.

Q. I am just suggesting that in this study you are evaluating the management of the Montana Power Company with respect to the costs of service herein involved, are you not?

A. I am not evaluating the management as such. I have, of course— Strike that.

My study reflects the actual situation, and to the extent that management has affected costs and affected revenues, then, obviously, management has affected the result.

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596

Q. Would you refer to Schedule 3, please.

With respect to your cost of service, do you have included therein any sums of money for headwater benefits?

A. No, sir, for the reasons stated in my testimony.

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Melwood W. Van Scoyoc

Cross-Examination

By Mr. Sander:

602

By Mr. Sander:

Q. Mr. Van Scoyoc, in the last few minutes you made a statement which interested me very much. When Mr. McElwain

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was cross-examining you about the treatment of the non-project account of \$400,000, you mentioned that you were allocating in accordance with the Federal Power rate case allocations. Do I gather that what you are doing here is largely, you followed the same practice that is followed in rate cases, is that right?

A. Yes.

Q. In your judgment?

A. Yes, in my judgments, so far as making certain determinations. The primary one is the functionalization of the plant of Montana Power Company between generation, call it power supply, and transmission and distribution; also operating expenses, depreciation, taxes, and return, so that I have a determined cost for each of these functions. And the principles that I applied were those which have been employed by the Federal Power Commission and by myself for many years subject to this item of deferred taxes arising from Section 168 where I disagree with the Commission's treatment of that item for rate-making purposes.

Q. Then, essentially, the approach in your study is from a rate-making point of view, is that right?

(603)

A. The approach to a determination of the commercial value of the Kerr Project has involved certain rate-making aspects because Montana Power Company is subject to rate regulation, its profits or its return is limited by the factor of

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regulation.

I think that is the end of my answer.

Q. I think that answers the question, yes.

A. May I just expand with one other thing?

Q. Go ahead.

A. By the fact that I have used methods which I have used in rate cases doesn't make this a rate case, and I am not making any recommendation with respect to the rates of Montana Power Company.

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Q. Have you ever been involved in any other proceedings or any other study involving the setting of charges for use of land?

A. No, sir, I have not.

Q. Is this the first study of its kind that you have

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made?

A. That is right, it is.

Q. And I take it again that the principal basis of the study you have made is your experience in rate work?

A. Yes, my experience in public utility regulation.

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By Mr. Sander:

Q. I will revise the question: What was your purpose for looking at the next most profitable use of the land?

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A. It was because of the language of 30(d) of the license, and also I believe similar language is included in Regulation, I believe it is, Section 5.

Q. Yes, you refer to that regulation in your testimony, and I wanted you to give us the specific reference to that regulation 14.

A. The language of Section 5 of Regulation 14.

Q. That was the regulation that was in force at the

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time the license was issued, is that right?

A. I believe it was.

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Q. Supposing that you had used, let's say, your 1956, '57 and '58, or any one of those three years, would you surmise using the same method as you have now the result would be the same or different as to the amount of annual charges which you would come up with?

A. It would probably vary somewhat due to the relationship between cost and revenues in other years. We would do the best we could with the information that was available to determine what we would consider the commercial value of the Kerr plant.

Obviously, the commercial value is not a constant. It varies with economic conditions, and once you have determined

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it, it doesn't remain the same. It might be affected by regulatory action. Montana Power Company might reduce its rates, might increase its rates. And, as I previously pointed out in my testimony, when you are dealing with a public utility the commercial value is affected by the factor of regulation.

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By Mr. Sander:

Q. Now on page 10, in the third line, you indicate if there was no profit there would be no payment to the Indians. Would there also be no payment to the Indians if there were no reasonable return?

A. Yes. I would say yes.

Q. Supposing the project operated at a loss?

A. If the project operated at a loss, it would have no commercial value.

And under Section 30(d), I don't believe there would be any annual charges as I understand the language of Section 30(d).

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By Mr. Sander:

Q. In the middle of page 11, in answer to Question 22,

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you end part of your answer in the first paragraph with the statement "... including a reasonable return on the net investment of the Company in the physical facilities used to produce power and energy is deducted from the revenue amounts to determine the annual income applicable to the Kerr Plant power site."

Are you saying that you allocated revenues for the Kerr Plant on the basis of its rate base?

A. No. That wasn't what I did. I determined the revenue of Montana Power Company reasonably attributable to Kerr Plant on the basis which I explain in my testimony, and from this revenue amount I deducted Kerr Plant costs, including a reasonable return on the net invest-

ment of the company in the physical facilities used to produce power and energy.

In other words, Montana Power Company has an investment, net investment of something over \$13 million in the hydraulic plant of Kerr, and my method would provide to Montana Power Company in determining the commercial value of the project a reasonable return on that investment, and in addition to that Montana Power Company would share in the annual income above that return.

Q. Did I understand you correctly then that you determined the income or revenue attributable to Kerr on the basis of generation, then, instead of rate base?

A. Generation at Kerr was one of the factors. The other

#### 524

factor was the capacity of Kerr Plant, and that is shown on Schedule No. 2, Sheet 3.

Q. Would it be correct, then, to say that you allocated the revenues attributable to Kerr on the basis of energy and capacity, is that what you are saying?

A. Yes, energy and capacity based on the unit costs which I developed for all of the power supply of the Montana Power Company.

Q. You refer to Sheet 1 of Schedule 4. From this sheet you have broken down the operation of Montana Power Company system to functions.

Am I correct insofar as transmission and distribution in Columns 6 and 7, the operating income listed on line 42 is allocated on the basis of the rate base?

A. Yes, the operating income on line 42 is allocated to functions on the basis of the respective rate bases shown on Sheet 1 of Schedule No. 5.

\* \* \* \* \*

Q. If we were to take the net investment of \$14,284,519 and divide the earning figure by that we would get about 23 percent?

A. I haven't calculated it, but I will accept it subject to check.

Q. It is about that. Let's say approximately that. This would then be the return based on allocation of generation and—well, let's say capacity and energy as we have used it before?

A. Including both the plant and the power site value?

Q. Yes.

A. Yes, sir.

Q. If, however, we use your assumption back here on page 28 that every dollar earns the same amount, the earning for Project 5 would then be 9.37 which you calculated on Sheet 1 of Schedule 6, would it not?

A. That is true, but I would not believe that concept

to be correct when we are determining the commercial value of the power site.

Q. I realize that. I was just carrying the calculations through.

And if you applied that figure, 9.37, to the average net investment of \$14,284,519, the figure we get would be \$1,400,000 instead of the \$3,318,305?

A. I haven't made the calculation, but I will accept it subject to check.

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Q. To pursue a little further, accepting the assumption that you have made, you have indicated the method that you

have used here in formulating Exhibit 5 is based on the assumption that every dollar earns the same amount. Is there any other method that you can think of by which you could have accomplished the same thing or is this the best method that you know of, is it the most precise?

A. It is the best method that I could think of considering the problem which is at hand, what are the revenues reasonably attributable to Kerr plant because they are not directly determinable as a matter of accounting as the sales do not take place at the bus bar of the plant. Therefore, what are the revenues that are reasonably attributable to the plant—this to my mind at least is a satisfactory and sound method of making such a determination.

Q. Would you have used this method whether or not you made that assumption?

A. I don't know that I could separate the method from the assumption. It is a method of allocation and proration based upon that assumption.

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681

By Mr. Sander:

Q. Taking the question I asked you about 1960, which on Sheet 5 of Schedule 2 you show no generation. You have, however, on Sheet 3 of Schedule 4 allocated an operating income to the steam?

A. Yes, that is correct.

Q. And that was allocated, then, on the basis of the rate base?

A. Yes, it was.

Q. And not on the basis of generation?

A. Not on the basis of generation.

Q. There is one other question I want to clear up, and that is we have established that you have used the rate

base for allocating operating income and we have also, I believe, agreed that when you got to Kerr Project 5 that you used generation and energy as a basis of allocating the income, is that right?

A. I use capacity and energy as a basis of dividing the revenue applicable to power supply.

Q. In other words, you used energy and capacity as a means there of determining the income rather than the rate base?

A. Determining the revenue reasonably attributable to Kerr Project.

Q. What was your reason for doing it that way instead of continuing as you had in the other part of your study of allocating by rate base?

A. Because I was determining the commercial value of the power site at Kerr Project, and to determine the commercial value I believe it is necessary to compare the costs and revenues with respect to that particular project. The costs were determined and are shown on Schedule 3. The revenues were determined by the method that I have previously explained, and the problem at that stage was then to divide those revenues between capacity and energy on a system basis so that I could determine the amount thereof which was reasonably attributable to Kerr hydraulic plant.

Q. You have developed a net investment basis. Why

could you not have used that for purposes of allocation and allocated to Kerr its portion of the revenues?

A. Because a method of that kind does not recognize the power producing capabilities of a particular project, to wit, Kerr Project, and in order to determine the commercial value of Kerr Project I believe the power producing and



capacity providing ability of Kerr Plant must be taken into account.

Q. Wouldn't that also be true for all of the other generating units in Montana Power System, steam also?

A. It would be if one were to make a similar study with respect to the other generating units of Montana Power Company.

Q. In other words, then, in your study up to the point where you started to use generation and energy you were using a procedure which was more or less akin to a rate calculation, but when you got to that point your purpose changed and you then used energy and capacity, is that right?

A. Well, we use ratios based on energy and capacity in rate cases, too. But the process which I followed was a process of determining as reasonably as I could the revenues applicable to Kerr Project and to deduct from those revenues certain costs related to Kerr Project, the balance being the annual income applicable to the power site.

Certainly in the allocation processes that I have testified

#### 684

to, many of them are parallel to the methods which I have used in numerous rate proceedings, and to that extent it can be said that I have used rate-making procedures. But, as I said earlier, this is not a rate case and I am not determining the validity of the rates of Montana Power Company, either wholesale or retail.

Q. If you had carried your study through consistently then, you would have assigned to Project 5 that part of its income based on its rate base, would you not?

A. I am bothered with your word "consistently," because I don't think I have been inconsistent in my treatment of this—

Q. Let's not say I mean you are inconsistent. My problem is you go along in your study and you use the rate

(684)

base for allocating income, and then when you get to dealing with Kerr you do not use the rate base, and my problem with that is I still do not understand why you made this change. This is all I am trying to find out.

A. Because the use of the rate base with the purpose for which you suggest would not have provided in my opinion any answer as to the commercial value of the Kerr Project. It would have provided an answer to the excess earnings subject to an adjustment for the specified reasonable rate of return for the Kerr Project, under the method which the Commission has agreed to in non-litigated cases, and which the Staff

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and the Examiner have—I am sorry, and which the Examiner in Project 82 has utilized, but the determination of the excess earnings to be transferred to the amortization reserve is a different matter than determining the commercial value of the project in connection with the Section 30(d) of the license.

Q. And my question is, why is that not true or why is that true, and I wonder if you want to answer that tomorrow morning?

A. Why is what not true?

Q. Why is it true that this method would not show commercial value?

A. You mean why the method which has been employed with respect to the determination of excess earnings for transfer to amortization reserve does not show the commercial value?

Q. No. Why is it true that if you had continued to allocate to Kerr its share of the revenues on the basis of its rate base it would not have shown the true commercial value, and what I want to know is why would it not.

Maybe you want to answer that tomorrow morning.

(700)

A. I have tried to answer that several times today, but I will be glad to consider it over the evening.

Q. Why don't we start with that one tomorrow morning?

\* \* \* \* \*

Walton Seymour

Direct Examination

By Mr. McElwain:

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Q. 8. Did you make a study of this project at the request of The Montana Power Company to determine the reasonableness of the annual charges for the use of Indian lands involved in the project as of 1959?

A. 8. I did.

Q. 9. Will you please state what you did in the way of preparation for such study?

A. 9. I made a personal inspection of the premises and project. I determined those matters which, in my opinion, represented changes in conditions since the annual charges were established in 1930. I reviewed the original licensing proceedings and the various Congressional documents which were material to the establishment of the annual charges including the license and

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all of its amendments. I have studied situations similar to that at the Kerr project where Indian or Government lands and facilities were used for power development, either by the Federal Government by condemnation, or under Section 10(e) of the Federal Power Act. I have studied the relative position of the Kerr Project in The Montana Power Company system during the 20-year period from 1939 to 1959.

Q. 10. As a result of your studies, have you taken into

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consideration the commercial value of the lands for their most productive use, including power development?

A. 10. I have, and I have concluded that the most productive use is power development.

Q. 11. Will you please give us your opinion of a reasonable annual charge for the use of Indian lands for this purpose at the Kerr Project as a result of your study as of May 20, 1959?

A. 11. In my opinion, a reasonable annual charge for such use of Indian lands at the Kerr Project is \$270,000 per annum.

Q. 12. How did you reach that conclusion?

A. 12. My research in this matter indicated that when the original license was issued in 1930, the annual charge for the use of Indian lands was a very liberal arrangement reached after considerable negotiations by the parties sitting down across the table. This conclusion is affirmed by the statements of the Assistant Commissioner of the Bureau of Indian Affairs, Mr. Scattergood, in his report to the Secretary of Interior, when he said that it had become "possible \* \* \* to considerably increase the Indian rental \* \* \* even beyond the

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expectation of the Indians." My review of the licensing proceeding and the various reports to Congress on this matter leads me to the conclusion that the provision in the license that the annual charges might be readjusted at the end of a 20-year period did not contemplate a *de novo* renegotiation of the annual payments. Rather, future readjustments, if any, should be related only to any substantial changes in the physical circumstances, and, in particular, to identifiable events calling for such corresponding adjustments in the annual payments as such changes of circumstance might warrant. This seems clear by both the Scattergood Report and the hearing on the original license.

Some of those events and changes of circumstances have occurred—others have not.

Q. 13. To what changes of circumstance do you refer?

A. 13. The factors which should be considered in determining whether readjustment of annual charges for Indian lands at Kerr should be made as of 1959, and its magnitude, include the following:

1. The annual payment of \$175,000 specified in the license for the later years was a liberal payment.

2. The yearly payment of \$63,375 determined by the FPC for Unit No. 3 as of December 1, 1954.

3. The availability of Hungry Horse regulation and the charges associated therewith.

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4. The reimbursement expected to be received by Montana Power from downstream beneficiaries of Kerr regulation.

In 1930, when the Kerr license was issued, Thompson Falls Project on the Clarks Fork of the Columbia was the only other hydroelectric development on this river system between the headwaters of the Flathead River and the mouth of the Columbia River, with the exception of a small mining operation project at Metaline Falls. Since that time, 13 additional downstream projects have been constructed on the Clarks Fork, Pend Oreille and the Columbia Rivers which use water released from storage of Flathead Lake successively, after passing through Kerr turbines or over Kerr spillways, to generate up to eight times as much power downstream as such water can generate at Kerr. This represents one change of condition which is of such a nature that should be considered in a reappraisal of the annual charges after a 20-year period.

Two other changes have occurred. One is the construction of the Hungry Horse Project by the Federal Govern-

(702)

ment on the south fork of the Flathead River above the Kerr Project. This project has some 3,000,000 acre feet of active storage created by storage of excess spring and summer runoff. This water would probably be spilled as being in excess of load requirements by downstream projects including Kerr, if it were not stored at Hungry Horse during this high water season. This stored water is later released in the low-flow period of the year—roughly September through March—when it supplements

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the naturally available flow and thus enables Kerr and the other 14 downstream plants to generate more power than would be possible without Hungry Horse storage and releases. This is equally true of the 1,217,000 acre-feet of storage in the Kerr Project as far as the 14 other downstream projects are concerned.

Because of the construction of the Hungry Horse Project, another change occurred which is identifiable—the addition of the third generating unit at the Kerr Project.

These three changes have occurred since 1930. One change contemplated in the original license proceeding which could affect the annual charges has not happened; that is, the possibility of increasing the range of fluctuation of Flathead Lake through the dredging of the channel approach to the dam and power producing facilities thus allowing a greater use of the available storage.

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Melwood W. Van Scoyoc

Cross-Examination (Cont'd)

By Mr. Sander:

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Q. Would you proceed to give us your answer to that question?

A. I probably should have written a discourse on this, but I didn't. In looking over my testimony on page 683, starting with the first answer at the top of the page, and likewise my previous answer at the bottom of page 682, I don't know that I can add very much to that, but I perhaps can illustrate—

Q. That would be helpful I believe.

A. —the situation as I view it, is that taking the cost of Kerr project—the annual costs or the total costs

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of service as shown on Schedule No. 3, we have an annual cost on line 14 that roughly approximates, say, \$1,950,000 on the average, and Kerr has certain capacity availability and it has a certain kilowatt hour output, on an average basis it is 1,060,000 megawatt hours. We could very well have another hydro electric project or other source of power which in relation to the capacity availability and the kilowatt hour output would be approximately the same as Kerr but the annual cost of producing that kilowatt hour output and providing the capability would be substantially different from Kerr, it might be more and it might be less, and it is my belief that in determining the commercial value of a hydro electric project consideration should be given—I think under the very definition of what is commer-

(793)

cial value—to the value of the output of the project in relation to its annual cost. It was for that reason that I determined to use the method which I did of ascertaining the revenue which would be reasonably attributable to the Kerr plant out of the aggregate revenue which the company receives from the sales of all energy and capacity after deducting the transmission and distribution costs.

Q. If I follow you then correctly, are you saying that allocation on the rate base does not reflect the relative revenue from the sale of generation from the plants

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in the system?

A. It does not reflect the relative values of the plants in supplying the system load requirements.

Q. Then in your method why do you assume that each function earns only the earned rate of return multiplied by the functional rate base?

A. I think for the purpose for which I use the allocation that that is the only reasonable assumption that can be made. I do not know of any other assumption that I would consider reasonable in attempting to determine the revenue of Montana Power Company applicable to the power supply function.

Q. In other words, you are not assuming, then, that a generating station earns the rate of return based on the rate base?

A. Not in determining the commercial value of the tribal lands.

Q. What about determining the earnings?

A. Or the annual income applicable to the power site, yes.

Q. In other words, you are saying then that depending on what you are looking for this determines the method that you are going to use?



(796)

A. When you say this determines the method, I am not certain just what you are referring to.

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Q. Let me illustrate it in another way. We have had a lot of talk about rate schedules and rate philosophy, this is from a rate point of view. We are assuming, are we not, an industry that is regulated?

A. I have assumed in this case, in fact I know it to be a fact, it wasn't an assumption, that Montana Power Company is subject to rate regulation by both the Federal Power Commission as to certain sales and by the Montana Public Service, and the very nature of regulation is designed to put a limit or to limit monopoly profits to a reasonable level.

Q. In rate making we are concerned with the total system revenues and their relationship to the total investment of the system, is that right?

A. If you were making an overall determination of the earnings of the system, then you would relate the operating income derived by deducting revenue deductions from revenue to the rate base to determine that percentage rate of return.

Q. From that approach we are not too much concerned, are we, about the contribution of each individual production unit in the system to the total revenues?

A. We are not concerned certainly as a general rule as to the contribution of any particular power producing, transmission or distribution facility to the total system.

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We do have problems, however, of allocation when we attempt to break down the costs, the overall system costs to particular customers or customer classifications for determining the reasonableness of the particular rates applicable to that customer or customer classification.

(796)

Q. So I get this a little more clearly fixed in my mind, let's make the assumption that an electric system has two transmission lines, that each has the same carrying capacity, but that the first line has twice the net, net investment of the second if the annual costs for each were the same. Would you allocate the same amount of earnings to each line?

A. Normally, you wouldn't allocate earnings to a transmission line. The transmission line serves the purpose of carrying power from the power supply function to the distribution system or a customer. You would treat the transmission system primarily as a group, you would roll it in. There are certain exceptions to that which I don't think it is worthwhile to go into. But generally speaking the transmission system is treated as a unit.

Q. As a cost?

A. For costing purposes.

Q. I have a little diagram illustrating the next question or the hypothetical that I am passing now. For the purposes of this question, could you assume that we have four

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generating stations in an electrical system, and the generator G-1 produces energy at the average cost of 1 mill per kilowatt hour, then generator G-2 at two mills per kilowatt hour, generator No. 3 at 3 mills per kilowatt per hour and generator No. 4 at 4 mills per kilowatt hour and each generating station has the same net investment. Now, if the system receives a revenue equivalent to the five mills shown on this diagram per kilowatt hour, would you say that the dollars of investment in generator No. 1 in fact earn the same as the dollars in the investment of generator No. 4?

A. You are assuming in your question that this is a rate proceeding and you are determining the cost of generation?

Q. Let's do it both ways. Let's take it from a cost accounting point of view and then let's take it from a rate

making point of view, if that will make the question easier.

A. From a rate making point of view, you would roll in all of the costs of all the generating stations of the company into the rate base, all of the costs of maintenance, operation, taxes, would be rolled together, and you would not be concerned in a rate case with individual generating plants. It would be very rare that that would be a concern in a rate case.

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Q. Then for the cost accounting approach, would your approach be different?

A. Well, the cost accounting is simply a process of assembling costs which are related to these generating plants. I am not certain just how that would have a bearing.

Q. Let's take it this way. Supposing that you were called on by the company that owns these four generators and you were asked to find out what each one contributes dollarwise to the sales of electricity, what would your answer be after you have looked at the assumed facts that we have?

A. I assume that these costs you have here of 1, 2, 3, 4 and 5 mills are the complete costs?

Q. Yes. I am just trying to simplify this as much as possible to illustrate it.

A. Certainly, looking at this all by itself, the generating plant G-1, of course, is a much more valuable plant than the other three plants in terms of being able to supply the load requirements at a lesser cost than the other plants. The margin between your five mills and your one mill is four mills, whereas if you take plant G-4, the margin is only one mill. That might be an old obsolete steam plant, for example, a high cost plant.

Q. Then, in fact, per dollar invested in G-1, it earns more than the other three?

A. Yes. If you wanted to treat it on that sort of a basis and determine the commercial value of the plant independently and not for rate making purposes. Of course, there are some complications because one plant may be used solely for peaking purposes, the other plant may be a base load plant, so those are other factors that would have to be taken into consideration which are not considered here in this simple illustration.

Q. Just to pursue this a little further, supposing that the G-1 generating plant has depreciated to where the net investment is close to zero but that—well, take all the plants—and that the net investment for the transmission and distribution plant was very high, then under the method that you have used in the first part of your study, would not most of the earnings of the system be allocable to the transmission and distribution and not to the generation?

A. It is hard for me to realize such a situation existing where you have a system which has grown up over the years, so you have a very hypothetical example.

Q. This is for illustration only, Mr. Van Scoyoc.

A. And under the method that I have used to obtain the amount of revenue applicable to the power supply, the fact of the relative investments would have an effect. As I pointed out yesterday, there are other costs besides

investment which have to be taken into account.

Q. Under the method of allocation in the first part as the hypothetical is stated, would not most of the earnings be allocated to the distribution and transmission?

A. On the basis of your assumption that would be true, but that is the way it should be on that assumption because if you have that disparity in investment and some other

costs that go along with it on the same ratio, you would have that type of situation.

Q. If you would refer to the diagram I gave you and use it again, if we were to make the supposition that power were sold at 2.5 mills per kilowatt hour—

A. You mean it were sold at 2 and a half mills at the bus bar of the plant, and this were an integrated coordinated system?

Q. Yes.

And suppose that G-4 were the cheapest last increment, would there be any way of justifying new construction?

A. Well, that raises some questions of justifying the new construction of a generating station where it is obvious that the product from that station would have to be sold for less than the cost to produce it. The question would be raised immediately, is there some other alternate source which is cheaper, and if there was not, the load has got to be satisfied, then they would have no alternative but to make a decision to build that facility. It might result

# 801

in a rate increase as a result of it, but that has happened. I think right after Montana Power Company put in the Cochrane plant I believe they asked for a rate increase. And that has happened quite often in other situations where a utility has had to add a facility which has added to its rate base sufficiently to disturb the revenue-investment relationship.

Q. Then our problem is in the Pacific Northwest now any new plant is always more than the prevailing rate, is that right?

A. That is a pretty sweeping statement that any new plant is higher than the prevailing rate. I would agree with you that generally the cost of power produced by the newer hydro plants in the Pacific Northwest is higher than

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the cost of power which is produced at the plants constructed in the earlier years for two reasons: (1) We have had an increase in the cost of construction, and (2) The best, most economical and cheapest sites were developed first as a general rule to the extent that these sites fitted into the load growth of the utilities in question.

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**1561A**

**Oral Argument of Mr. Newton Frishberg,  
Appearing for the Secretary of the Interior,  
Before the Federal Power Commission**

Commissioner Carver: What is the position that the Department is asking the Commission—what position, in what position does the Department put the Commission, coming here in a litigated contested proceeding, and then saying that they will abide by the results if it suits them.

Mr. Frishberg: Well, it is obvious that by the fact we are here that we have assumed all of the obligations of other parties, that we take whatever the Commission does have seriously, and hold the Commission in ultimately high respect because of our posture here.

It is true, there is an inconsistency in appearing as both a litigant, as it were, and then as a kind of a review board, or a board of review if only for a negative purpose.

Commissioner Carver: Then is it your position if this Commission takes or reaches a conclusion as to benefits less than those you assert, or the Secretary asserts to be fair and reasonable, we may anticipate there will be a veto?

Mr. Frishberg: There may be an attempt at a veto. I can't

**1562A**

say for sure. We hope there won't be, or we hope we won't feel the need to do this.

Commissioner Carver: You hope we don't depart from what you said is the right figure?

(1565A)

Mr. Frishberg: Please don't try to put me on the spot, because we have not discussed what the Secretary might ultimately do. A large part of this depends on what the tribes feel. A large part depends on how we assess the situation after your decision.

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1564A

Commissioner Carver: Well, I'm trying to postulate the situation, where you must choose between non-concurrence, and appeal. And if you are going to tell me that you are going to subject the Secretary to the jurisdiction of the Court, but not to us, I'm going to ask you on what basis you make the distinction?

Mr. Frishberg: Because of the Secretary's independent statutory obligation, as trustee for the Indians.

Commissioner Carver: Is that reviewable by the Courts?

Mr. Frishberg: I would think so. I would think if, in the very unlikely situation—and I say very frankly I think this would be highly unlikely, and this discussion is essentially academic—but in the unlikely situation that a stalemate occurred—I'm not saying there may not be a dialogue between the Commission and the Secretary, assuming you agree that the Secretary has some kind of power.

Commissioner Carver: If I can interrupt you. It isn't precisely academic, this has already happened once?

1565A

Mr. Frishberg: Yes, I know, but it was resolved.

Commissioner Carver: On your terms.

Chairman White: That is right.

Mr. Frishberg: Well, on our terms. I think those terms were very modest, frankly. But those terms did agree, incidentally, and were based on Staff—on the Commission Staff's recommendations.

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(1487)

1487

Stanley E. Sporseen

Confederated Tribes Exhibit No. 1

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It is therefore believed that a satisfactory method of determining relative values would be to base these values on firm power capacity for a plant at this site without storage, a plant with Flathead Lake storage, and the same plant with Hungry Horse storage available. Assuming 1964 as an average year for the period 1959-69, critical period energy credited to Hungry Horse storage, Kerr storage and Kerr without storage has been determined. These results were determined by the same method as used by Columbia River Coordinating Committee and are 657, 251 and 161 MW/Mo., respectively. These figures are developed on Table 5. Also shown on Table 5 are Kerr payments for Hungry Horse storage and payments for Kerr storage

1494

from downstream plants. Kerr storage should probably have some additional credit for re-regulation of releases from Hungry Horse, simplifying operation at Hungry Horse and daily and weekly pondage for Kerr power plant. It has therefore been decided to multiply the Kerr storage factor by 1.5 and the three factors would then be 657, 376 and 161 respectively. The factors for Kerr storage and the hypothetical project without Kerr storage (Hungry Horse storage and Kerr without storage) would then be 376 and 818 or 31.5% and 68.5% respectively. Under this proposal, the Indian interest in the Kerr Project benefits as a whole would then be  $(0.25)(0.315)$  plus  $(0.50)(0.685) = 0.4213$  or 42.18%. Benefits accruing to Kerr Reservoir, such as payments for downstream benefits, would be shared on the basis used in the Third Unit proceedings, 25% to the Tribes.



(1501)

1501

TABLE 5

HEADWATER BENEFITS STUDY 1964  
WITHOUT BUFFALO RAPIDS

1. Headwater Improvement Project:		Hungry Horse		Kerr	
Dam & Reservoir Costs					
2.	Total annual cost to be apportioned		\$2,394,125	\$612,053	
3.	Total critical period energy at Site MW-MO		1,570	1,069	
4.	Total energy from storage MW-MO	4	7,426	2,307	
5.	Portion of annual cost alloc'd to storage (3+4)		0.830	0.684	
6.	Amount of Ann. cost alloc'd to storage (2)(5)		1,982,000	419,000	
Energy Gains & Apportionment		Gains	Costs	Gains	Costs
of Costs by Projects		MW-MO	\$	MW-MO	\$
Federal					
7.	Hungry Horse	1,496	399,500	—	—
8.	Albeny Falls	88	23,500	37	6,700
9.	Albeny Falls	1,240	331,200	467	84,800
10.	Chief Joseph	679	181,400	262	47,600
11.	McNary	339	90,500	130	23,600
12.	The Dalles	333	88,900	128	23,300
13.	Bonneville	232	62,000	88	16,000
14.	Total Federal	4,407	1,177,000	1,112	202,000
Non-Federal					
15.	Kerr	657	175,000	251	45,600
16.	Thomson Falls	79	21,000	69	12,500
17.	Noxon Rapids	603	161,000	228	41,600
18.	Cabinet Gorge	388	103,500	150	27,300
19.	Box Canyon	146	39,000	57	10,400
20.	Spokane River	—	—	—	—
21.	Chelan	—	—	—	—
22.	Rocky Reach	388	103,500	147	26,700
23.	Rock Island	187	50,000	73	13,300
24.	Wanapum	267	71,000	102	18,500
25.	Priest Rapids	304	81,000	117	21,200
26.	Round Butte and Pelton	—	—	—	—
27.	Total Non-Federal	3,019	805,000	1,195	217,000
28.	Grand Total—Federal & Non-Federal	7,426	1,982,000	2,307	419,000
Energy Gains & Apportionment of Costs by Ownership					
29.	United States	4,407	1,177,000	1,112	202,000
30.	The Montana Power Company	736	196,000	320	58,200
31.	The Washington Water Power Co.	991	264,300	379	68,800
32.	PUD #1 of Pend Oreille Co.	146	39,000	57	10,300
33.	PUD #1 of Chelan Co.	575	153,500	220	39,900
34.	PUD #2 of Grant Co.	571	152,200	219	39,800
35.	Portland General Electric	—	—	—	—
36.	Total		1,982,000		419,000
*	*	*	*	*	*

(1555)

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Confederated Tribes Exhibit No. 5

Witness: Melwood W. Van Scoyoc

Date: August 22, 1965

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THE MONTANA POWER COMPANY

PROJECT No. 5

Confederated Tribes Exhibit No. 5

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## SCHEDULE No. 1

## THE MONTANA POWER COMPANY

Determination of Annual Charges  
Payable To Indian Tribes For Use Of Tribal Lands

	Annual Amounts Per Sheet 3, Schedule No. 2	Adjusted to Exclude Portion of Year 1958
	(1)	(2)
1958	\$ 700,070	\$ 222,748
1959	1,324,385	1,324,385
1960	1,282,580	1,282,580
1961	1,434,528	1,434,528
1962	1,271,591	1,271,591
1963	1,087,346	1,087,346
1964	1,177,991	1,172,991
Total	\$8,278,491	\$7,796,169
Average	\$1,182,642	\$1,214,982

ANNUAL CHARGES COMPUTED ON BASIS OF  
NORMAL CONDITIONS

Demand Revenue	180,000 KW x \$8.448 =	\$1,520,640
Energy Revenue	1,060,000 MWH x \$2.148 =	2,912,880
Total		\$4,433,520
Kerr Plant Costs—(Average)		1,924,293
Annual Income Applicable to Kerr Power Site Value		\$2,509,227
Indian Tribes Share—57.53%		\$1,443,558
RECOMMENDED ANNUAL CHARGE		\$1,300,000

THE  
MONTANA POWER COMPANYDetermination of The Indian Tribes Share of  
The Annual Income Applicable to Kerr Power Site

Line No.	Description	1958	1959	1960	1961	1962	1963	1964
1	A. <u>Assignment to Kerr Plant of Power Supply Revenue on Kilowatt Demand Basis</u>							
2	Revenue Applicable to Power Supply	\$14,811,411	\$15,275,217	\$16,061,913	\$16,561,699	\$16,614,366	\$16,162,410	\$16,422,621
3	Maximum System Demand - Kw	633,000	607,000	607,000	684,000	721,000	731,000	669,000
4	Annual Revenue per Kw	\$ 23.3987	\$ 25.165	\$ 26.461	\$ 24.213	\$ 23.044	\$ 22.110	\$ 24.548
5	Kerr Plant Demand at System Peak - Kw	186,300	180,300	174,300	184,300	184,300	188,300	121,300
6	Annual Revenue Applicable to Kerr	\$ 4,359,178	\$ 4,537,250	\$ 4,612,152	\$ 4,462,455	\$ 4,247,009	\$ 4,163,313	\$ 2,977,672
7	Kerr Plant Annual Cost	\$ 1,897,944	\$ 1,887,794	\$ 1,952,888	\$ 1,974,821	\$ 1,952,752	\$ 1,931,258	\$ 1,872,596
8	Annual Income Applicable to Power Site	\$ 2,461,234	\$ 2,649,456	\$ 2,659,264	\$ 2,487,634	\$ 2,294,257	\$ 2,232,055	\$ 1,105,076
9	Indian Tribes Share - 57.53%	<u>\$ 1,415,948</u>	<u>\$ 1,524,232</u>	<u>\$ 1,529,875</u>	<u>\$ 1,431,136</u>	<u>\$ 1,319,886</u>	<u>\$ 1,284,101</u>	<u>\$ 635,750</u>
10	B. <u>Assignment to Kerr Plant of Power Supply Revenue on Megawatt Hour Basis</u>							
11	Revenue Applicable to Power Supply	\$14,811,411	\$15,275,217	\$16,061,913	\$16,561,699	\$16,614,366	\$16,162,410	\$16,422,621
12	Annual Energy - MWH	3,788,876	3,299,706	3,650,514	3,810,735	3,994,375	3,859,773	4,017,118
13	Annual Revenue per MWH	\$ 3.90918	\$ 4.62927	\$ 4.39990	\$ 4.34606	\$ 4.15944	\$ 4.18740	\$ 4.08815
14	Kerr Plant Output - MWH	649,277	859,215	905,562	1,028,915	989,180	858,743	1,065,614
15	Annual Revenue Applicable to Kerr	\$ 2,538,141	\$ 3,977,538	\$ 3,984,382	\$ 4,471,726	\$ 4,114,434	\$ 3,595,900	\$ 4,356,390
16	Kerr Plant Annual Cost	\$ 1,897,944	\$ 1,887,794	\$ 1,952,888	\$ 1,974,821	\$ 1,952,752	\$ 1,931,258	\$ 1,872,596
17	Annual Income Applicable to Power Site	\$ 640,197	\$ 2,089,744	\$ 2,031,494	\$ 2,496,905	\$ 2,161,682	\$ 1,664,642	\$ 2,483,794
18	Indian Tribes Share - 57.53%	<u>\$ 368,305</u>	<u>\$ 1,202,230</u>	<u>\$ 1,168,718</u>	<u>\$ 1,436,469</u>	<u>\$ 1,243,615</u>	<u>\$ 957,668</u>	<u>\$ 1,428,927</u>

THE  
MONTANA POWER COMPANYDetermination of The Indian Tribes Share of  
The Annual Income Applicable to Kerr Power Site

Line No.	Description	1958	1959	1960	1961	1962	1963	1964
1	C. <u>Assignment to Kerr Plant of Power Supply Revenue, One Half on Kilowatts of Demand and One Half on Megawatts of Energy</u>							
2	Revenue Applicable to Power Supply	\$14,811,411	\$15,275,217	\$16,061,913	\$16,561,699	\$16,614,366	\$16,162,410	\$16,422,621
3	Maximum System Demand - Kw	633,000	607,000	607,000	684,000	721,000	731,000	669,000
4	Annual Energy - MWH	3,788,876	3,299,706	3,650,514	3,810,735	3,994,375	3,859,773	4,017,118
5	Demand Revenue - 50%	\$ 7,405,705	\$ 7,637,609	\$ 8,030,956	\$ 8,280,849	\$ 8,307,183	\$ 8,081,205	\$ 8,211,310
6	Energy Revenue - 50%	\$ 7,405,706	\$ 7,637,608	\$ 8,030,957	\$ 8,280,850	\$ 8,307,183	\$ 8,081,205	\$ 8,211,311
7	Unit Demand Revenue per Kw	\$ 11.6994	12.5826	13.2306	12.1065	11.5218	11.0550	12.2740
8	Unit Energy Revenue per MWH	\$ 1.9546	\$ 2.3146	\$ 2.2000	\$ 2.1730	\$ 2.0797	\$ 2.0937	\$ 2.0441
9	Kerr Plant Demand at System Peak - Kw	186,300	180,300	174,300	184,300	184,300	188,300	121,300
10	Kerr Plant Output - MWH	649,277	859,215	905,562	1,028,915	989,180	858,743	1,065,614
11	Kerr Plant Demand Revenue	\$ 2,179,598	\$ 2,268,643	\$ 2,306,094	\$ 2,231,228	\$ 2,123,468	\$ 2,081,656	\$ 1,488,836
12	Kerr Plant Energy Revenue	1,269,077	1,988,739	1,992,236	2,235,832	2,057,197	1,797,950	2,178,222
13	Total Revenue - Kerr Plant	\$ 3,448,675	\$ 4,257,382	\$ 4,298,330	\$ 4,467,060	\$ 4,180,665	\$ 3,879,606	\$ 3,667,058
14	Kerr Plant Annual Cost	\$ 1,897,944	\$ 1,887,794	\$ 1,952,888	\$ 1,974,821	\$ 1,952,752	\$ 1,931,258	\$ 1,872,596
15	Annual Income Applicable to Power Site	\$ 1,550,731	\$ 2,369,588	\$ 2,345,442	\$ 2,492,239	\$ 2,227,913	\$ 1,948,348	\$ 1,794,462
16	Indian Tribes Share - 57.53%	\$ 892,136	\$ 1,363,224	\$ 1,349,333	\$ 1,433,785	\$ 1,281,718	\$ 1,120,885	\$ 1,032,354

THE  
MONTANA POWER COMPANY

Determination of The Indian Tribes Share of  
The Annual Income Applicable to Kerr Power Site

Line No.	Description	1958	1959	1960	1961	1962	1963	1964
1	D. <u>Assignment to Kerr Plant of Power Supply Revenue on Average Annual Energy and Excess Demand Basis</u>							
2	<u>Revenue Applicable to Power Supply</u>	<u>\$14,811,411</u>	<u>\$15,275,217</u>	<u>\$16,061,913</u>	<u>\$16,561,699</u>	<u>\$16,614,366</u>	<u>\$16,162,410</u>	<u>\$16,422,621</u>
3	Annual Energy - MWH	3,788,876	3,299,706	3,650,514	3,810,735	3,994,375	3,859,773	4,017,118
4	Average Annual Energy - Kw	432,520	376,679	415,587	435,015	455,979	440,613	457,322
5	Maximum System Demand - Kw	633,000	607,000	607,000	684,000	721,000	731,000	669,000
6	Excess Demand - Kw	200,480	230,321	191,413	248,985	265,021	290,387	211,678
7	Demand Revenue	\$ 4,690,774	\$ 5,795,417	\$ 5,064,321	\$ 6,028,458	\$ 6,105,780	\$ 6,419,709	\$ 5,196,117
8	Energy Revenue	\$10,120,637	\$ 9,479,800	\$10,997,592	\$10,533,241	\$10,508,586	\$ 9,742,701	\$11,226,504
9	Unit Demand Revenue per Kw	\$ 7.4103	\$ 9.5476	\$ 8.3431	\$ 8.8135	\$ 8.4684	\$ 8.7821	\$ 7.7670
10	Unit Energy Revenue per MWH	\$ 2.6711	\$ 2.8729	\$ 3.0126	\$ 2.7641	\$ 2.6308	\$ 2.5242	\$ 2.7947
11	Kerr Plant Demand at System Peak - Kw	186,300	180,300	174,300	184,300	184,300	188,300	121,300
12	Kerr Plant Output - MWH	649,277	859,215	905,562	1,028,915	989,180	858,743	1,065,614
13	Kerr Plant Demand Revenue	\$ 1,380,539	\$ 1,721,432	\$ 1,454,202	\$ 1,624,328	\$ 1,560,726	\$ 1,653,669	\$ 942,137
14	Kerr Plant Energy Revenue	1,734,284	2,468,439	2,728,096	2,844,024	2,602,335	2,167,639	2,978,071
15	Total Revenue - Kerr Plant	<u>\$ 3,114,823</u>	<u>\$ 4,189,871</u>	<u>\$ 4,182,298</u>	<u>\$ 4,468,352</u>	<u>\$ 4,163,061</u>	<u>\$ 3,821,308</u>	<u>\$ 3,920,208</u>
16	Kerr Plant Annual Cost	<u>\$ 1,897,944</u>	<u>\$ 1,887,794</u>	<u>\$ 1,952,888</u>	<u>\$ 1,974,821</u>	<u>\$ 1,952,752</u>	<u>\$ 1,931,258</u>	<u>\$ 1,872,596</u>
17	Annual Income Applicable to Power Site	\$ 1,216,879	\$ 2,302,077	\$ 2,229,410	\$ 2,493,531	\$ 2,210,309	\$ 1,890,050	\$ 2,047,612
18	Indian Tribes Share - 57.53%	<u>\$ 700,070</u>	<u>\$ 1,324,385</u>	<u>\$ 1,282,580</u>	<u>\$ 1,434,528</u>	<u>\$ 1,271,591</u>	<u>\$ 1,087,346</u>	<u>\$ 1,177,991</u>

THE  
MONTANA POWER COMPANY

Determination of Revenue Applicable to Power Supply Function

Line No.	Description	1958	1959	1960	1961	1962	1963	1964
1	REVENUE FROM SALES OF ELECTRICITY	\$30,335,129	\$31,104,396	\$33,385,624	\$34,998,769	\$36,970,396	\$37,583,110	\$38,850,646
2	TRANSMISSION AND DISTRIBUTION COSTS							
3	Operating Expense	\$ 4,535,864	\$ 4,857,062	\$ 4,994,110	\$ 4,907,407	\$ 5,576,000	\$ 6,074,488	\$ 5,934,062
4	Depreciation Expense	1,058,458	1,124,347	1,212,680	1,265,637	1,350,433	1,431,881	1,627,688
5	Taxes Other Than Income Taxes	1,975,256	1,935,188	2,224,340	2,494,460	2,701,181	2,825,546	2,877,628
6	Income Taxes	3,151,216	3,051,790	3,628,678	3,998,332	4,164,152	4,278,391	4,724,366
7	Provision for Deferred Income Taxes	206,861	286,029	334,133	383,223	451,854	359,390	-
8	Investment Tax Credit	-	-	-	-	118,350	126,650	100,035
9	Other Electric Revenues	( 246,527)	( 263,444)	( 276,837)	( 293,111)	( 287,063)	( 293,006)	( 324,522)
10	Return	<u>4,842,590</u>	<u>4,838,207</u>	<u>5,206,607</u>	<u>5,681,122</u>	<u>6,281,123</u>	<u>6,617,360</u>	<u>7,438,768</u>
11	TOTAL TRANSMISSION & DISTRIBUTION COSTS	<u>\$15,523,718</u>	<u>\$15,829,179</u>	<u>\$17,323,711</u>	<u>\$18,437,070</u>	<u>\$20,356,030</u>	<u>\$21,420,700</u>	<u>\$22,428,025</u>
12	REVENUE APPLICABLE TO POWER SUPPLY	<u>\$14,811,411</u>	<u>\$15,275,217</u>	<u>\$16,061,913</u>	<u>\$16,561,699</u>	<u>\$16,614,366</u>	<u>\$16,162,410</u>	<u>\$16,422,621</u>



THE  
MONTANA POWER COMPANY  
Energy Generated, Purchased and Interchanged

Line No.	Description	<u>1958</u>	<u>1959</u>	<u>1960</u>	<u>1961</u>	<u>1962</u>	<u>1963</u>	<u>1964</u>
1	Energy Generated - MWH							
2	Steam Generation	258,994	45,059	-	16,322	346,529	297,575	221,141
3	Hydraulic Generation	<u>2,822,394</u>	<u>2,687,236</u>	<u>2,955,050</u>	<u>2,922,669</u>	<u>3,130,273</u>	<u>3,020,405</u>	<u>3,281,905</u>
4	Total	3,081,388	2,732,295	2,955,050	2,938,991	3,476,802	3,317,980	3,503,046
5	Energy Purchased - MWH							
6	Washington Water Power Company	13,244	13,986	19,537	22,411	30,972	14,387	29,294
7	Bonneville Power Administration	350,400	350,400	351,360	350,400	362,910	350,400	351,360
8	U.S. Bureau of Reclamation	<u>271,558</u>	<u>173,201</u>	<u>231,165</u>	<u>269,397</u>	<u>157,393</u>	<u>170,496</u>	<u>124,315</u>
9	Total	635,202	537,587	602,062	642,208	551,275	535,283	504,969
10	Energy Interchanged (Net)	72,286	29,824	93,402	211,974	( 48,851)	( 6,668)	9,757
11	Transmission Service Energy (Net)	-	-	-	17,562	15,149	13,178	( 654)
12	Total Energy	<u>3,788,876</u>	<u>3,299,706</u>	<u>3,650,514</u>	<u>3,810,735</u>	<u>3,994,375</u>	<u>3,859,773</u>	<u>4,017,118</u>



THE  
MONTANA POWER COMPANY

Maximum Demand On System And Source Of Supply

Line No.	Description	1958	1959	1960	1961	1962	1963	1964
1	Date and Hour of System Peak Load	Nov.25-6PM	Jan.21-7PM	Dec.5-6PM	Dec.12-6PM	Jan.15-7PM	Dec.11-6PM	Dec.16-6PM
2	System Peak Load - One Hour <sup>1/</sup>	506,000	479,500	545,000	585,000	572,000	633,000	645,000
3	Deliveries to Other Systems - (Net)							
4	Washington Water Power Company	78,000	88,000	10,000	14,000	42,000	8,000	6,000
5	Idaho Power Company	6,000	5,000	3,000	3,000	4,000	4,000	4,000
6	Pacific Power & Light Company	34,000	-	8,000	-	2,000	19,000	-
7	Utah Power & Light Company	-	21,000	29,000	53,000	74,000	42,000	-
8	U.S. Indian Irrigation Service - Polson	5,000	7,500	8,000	10,000	11,000	11,000	14,000
9	U.S. Bureau of Reclamation	4,000	6,000	4,000	19,000	16,000	14,000	-
10	Total Demand on System	<u>633,000</u>	<u>607,000</u>	<u>607,000</u>	<u>684,000</u>	<u>721,000</u>	<u>731,000</u>	<u>669,000</u>
11	Source of System Supply at Peak Hour							
12	Steam Generation	-	58,000	-	-	60,000	64,000	64,000
13	Hydraulic Generation	<u>498,000</u>	<u>440,000</u>	<u>479,000</u>	<u>495,000</u>	<u>488,000</u>	<u>468,000</u>	<u>381,000</u>
14	Total	<u>498,000</u>	<u>498,000</u>	<u>479,000</u>	<u>495,000</u>	<u>548,000</u>	<u>532,000</u>	<u>445,000</u>
15	Received from Other Systems - (Net)							
16	Pacific Power & Light Company	-	-	-	22,000	-	-	25,000
17	Utah Power & Light Company	-	-	-	-	-	-	1,000
18	Bonneville Power Administration	87,000	55,000	73,000	112,000	118,000	144,000	138,000
19	U.S. Bureau of Reclamation - Canyon Ferry	48,000	54,000	55,000	55,000	55,000	55,000	55,000
20	U.S. Bureau of Reclamation - Fort Peck	-	-	-	-	-	-	5,000
21	Total Supply to System	<u>633,000</u>	<u>607,000</u>	<u>607,000</u>	<u>684,000</u>	<u>721,000</u>	<u>731,000</u>	<u>669,000</u>

<sup>1/</sup> Excluding Deliveries to Other Systems

THE  
MONTANA POWER COMPANY

Project No. 5 - Hydraulic Generation

Cost of Service Based on 6% Rate of Return  
(Excluding Annual Charge Amounts and Headwater Benefit Payments)

Line No.	Description	1958	1959	1960	1961	1962	1963	1964
1	<u>COST OF SERVICE</u>							
2	Operating Expense							
3	Operation	\$ 76,521	\$ 79,312	\$ 86,256	\$ 83,731	\$ 71,109	\$ 74,080	\$ 75,283
4	Maintenance	17,970	32,537	22,110	16,104	19,734	21,368	25,149
5	Miscellaneous	-	-	-	-	-	-	-
6	Total	\$ 94,491	\$ 111,849	\$ 108,366	\$ 99,835	\$ 90,843	\$ 95,448	\$ 100,432
7	Administrative & General Expense	49,607	55,567	51,799	57,436	51,693	56,476	52,972
8	Total	\$ 144,098	\$ 167,416	\$ 160,165	\$ 157,271	\$ 142,536	\$ 151,924	\$ 153,404
9	Depreciation	146,352	146,324	146,353	146,359	146,372	146,374	172,377
10	Taxes Other Than Income	418,531	391,319	409,535	465,895	483,975	510,873	467,606
11	Income Tax	362,112	364,848	430,279	407,693	391,209	340,907	306,521
12	Miscellaneous Revenue	( 1,205)	( 1,156)	( 1,078)	( 1,030)	( 780)	( 610)	( 640)
13	Return on Average Net Investment	857,071	848,090	840,389	833,557	826,382	818,308	808,763
14	Total Cost of Service	<u>\$ 1,926,959</u>	<u>\$ 1,916,841</u>	<u>\$ 1,985,643</u>	<u>\$ 2,009,745</u>	<u>\$ 1,989,694</u>	<u>\$ 1,967,776</u>	<u>\$ 1,908,031</u>
15	<u>AVERAGE NET INVESTMENT</u>							
16	301 Organization	\$ 871	\$ 871	\$ 871	\$ 871	\$ 871	\$ 871	\$ 871
17	303 Miscellaneous Intangible Plant	43,791	43,791	43,791	43,791	43,791	43,791	43,791
18	320 Land and Land Rights	334,941	334,941	350,750	380,659	406,555	418,350	418,332
19	321 Structures and Improvements	2,811,394	2,810,635	2,810,635	2,811,807	2,812,879	2,812,979	2,813,204
20	322 Reservoirs, Dams & Waterways	6,696,402	6,696,825	6,698,476	6,699,767	6,699,066	6,698,539	6,698,539
21	323 Water Wheels, Turbines and Generators	5,007,340	5,007,340	5,007,340	5,007,340	5,007,371	5,007,219	5,007,036
22	324 Accessory Electric Equipment	248,174	245,737	245,696	245,655	246,073	246,468	246,422
23	325 Miscellaneous Power Plant Equipment	164,803	162,672	162,938	162,831	162,680	162,498	162,389
24	326 Roads, Railroads and Bridges	310,714	310,714	309,950	309,187	309,167	309,149	309,149
25	371 Structures and Improvements	1,758	1,783	1,784	1,783	1,782	1,781	1,780
26	378 Communication Equipment	40,300	41,828	42,094	42,072	42,047	42,409	42,763
27	379 Miscellaneous Equipment	192	192	192	192	192	192	191
28	Total Average Plant	<u>\$15,660,680</u>	<u>\$15,657,329</u>	<u>\$15,674,517</u>	<u>\$15,705,955</u>	<u>\$15,732,474</u>	<u>\$15,744,246</u>	<u>\$15,744,467</u>
29	Accumulated Provision for Depreciation	1,376,161	1,522,497	1,668,040	1,813,339	1,959,442	2,105,771	2,265,075
30	Average Net Investment	<u>\$14,284,519</u>	<u>\$14,134,832</u>	<u>\$14,006,477</u>	<u>\$13,892,616</u>	<u>\$13,773,032</u>	<u>\$13,638,475</u>	<u>\$13,479,392</u>

THE  
MONTANA POWER COMPANY

SCHEDULE NO. 4  
Sheet 1 Of 7 1565

OPERATING INCOME BY FUNCTIONS  
Year 1958

Line No.	Description (1)	Total (2)	Power Supply			Transmission (6)	Distribution (7)	Total Transmission & Distribution (8)
			Steam (3)	Hydraulic (4)	Other (5)			
1	Revenue from Sales of Electricity	\$30,335,129	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
2	Operating Expense							
3	Power Production Expenses							
4	Steam Power Generation	\$ 265,748	265,748	\$ -	\$ -	\$ -	\$ -	\$ -
5	Hydraulic Power Generation	1,139,460	-	1,139,460	-	-	-	-
6	Other Power Supply Expenses	1,916,254	-	-	1,916,254	-	-	-
7	Total Production Expenses	\$ 3,321,462	\$265,748	\$1,139,460	\$1,916,254	\$ -	\$ -	\$ -
8	Transmission Expense	\$ 524,464	\$ -	\$ -	\$ -	\$524,464	\$ -	\$ 524,464
9	Distribution Expense	1,514,855	-	-	-	-	1,514,855	1,514,855
10	Customer Accounts Expense	574,882	-	-	-	-	574,882	574,882
11	Sales Expenses	360,165	-	-	-	-	360,165	360,165
12	Administrative and General Expense	2,139,314	84,642	493,174	-	275,336	1,286,162	1,561,498
13	Total Operating Expense	\$ 8,435,142	\$350,390	\$1,632,634	\$1,916,254	\$799,800	\$3,736,064	\$4,535,864
14	Depreciation Expense							
15	Steam Production Plant	\$ 133,904	\$133,904	\$ -	\$ -	\$ -	\$ -	\$ -
16	Hydraulic Production Plant	454,054	-	454,054	-	-	-	-
17	Transmission Plant	293,262	-	-	-	293,262	-	293,262
18	Distribution Plant	683,429	-	-	-	-	683,429	683,429
19	General Plant	162,836	9,907	71,162	-	30,509	51,258	81,767
20	Total Depreciation Expense	\$ 1,727,485	\$143,811	\$ 525,216	\$ -	\$323,771	\$ 734,687	\$1,058,458
21	Taxes Other Than Income Taxes							
22	Social Security and Unemployment	\$ 82,503	\$ 3,619	\$ 21,600	\$ -	\$ 10,680	\$ 46,604	\$ 57,284
23	Property	2,818,592	185,310	1,218,300	-	527,250	887,732	1,414,982
24	Electric Gross Proceeds - Montana	336,193	-	-	-	-	336,193	336,193
25	Franchise	5,380	367	2,382	-	1,044	1,587	2,631
26	Corporation License	324,718	22,165	143,795	-	62,966	95,792	158,758
27	City and County License	2,842	-	-	-	-	2,842	2,842
28	Telephone and Telegraph	3,143	124	724	-	405	1,890	2,295
29	Intrastate Utility	69	-	-	-	-	69	69
30	Stamp Tax	401	26	173	-	75	127	202
31	Total Taxes Other Than Income Taxes	\$ 3,573,841	\$211,611	\$1,386,974	\$ -	\$602,420	\$1,372,836	\$1,975,256
32	Income Taxes							
33	Federal	\$ 6,443,300	\$439,822	\$2,853,283	\$ -	\$1,249,411	\$1,900,784	\$3,150,195
34	State	1,021	-	-	-	-	1,021	1,021
35	Total Income Taxes	\$ 6,444,321	\$439,822	\$2,853,283	\$ -	\$1,249,411	\$1,901,805	\$3,151,216
36	Provision for Deferred Income Tax							
37	Accelerated Amortization	\$ 243,323	\$ -	\$ 243,323	\$ -	\$ -	\$ -	\$ -
38	Liberalized Depreciation	302,075	1,238	93,976	-	84,158	122,703	206,861
39	Total Provision for Def. Income Taxes	\$ 545,398	\$ 1,238	\$ 337,299	\$ -	\$ 84,158	\$ 122,703	\$ 206,861
40	Other Operating Revenue	\$ ( 295,923)	\$ ( 4,924)	\$ ( 44,472)	\$ -	\$ ( 67,337)	\$ ( 179,190)	\$ ( 246,527)
41	Total Revenue Deductions	\$20,430,264	\$1,141,948	\$6,690,934	\$1,916,254	\$2,992,223	\$7,688,905	\$10,681,128
42	Operating Income	\$ 9,904,865	\$ 676,109	\$4,386,166	\$ -	\$1,920,639	\$2,921,951	\$ 4,842,590

THE  
MONTANA POWER COMPANY

Operating Income by Functions  
Year 1959

Line No.	Description (1)	Total (2)	Power Supply			Transmission (6)	Distribution (7)	Total Transmission & Distribution (8)
			Steam (3)	Hydraulic (4)	Other (5)			
1	Revenue from Sales of Electricity	\$31,104,396	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
2	Operating Expense							
3	Power Production Expenses							
4	Steam Power Generation	\$ 171,274	\$ 171,274	\$ -	\$ -	\$ -	\$ -	\$ -
5	Hydraulic Power Generation	1,271,375	-	1,271,375	-	-	-	-
6	Other Power Supply Expenses	1,600,351	-	-	1,600,351	-	-	-
7	Total Power Production Expense	\$ 3,043,000	\$ 171,274	\$ 1,271,375	\$ 1,600,351	\$ -	\$ -	\$ -
8	Transmission Expenses	600,595	-	-	-	600,595	-	600,595
9	Distribution Expenses	1,665,674	-	-	-	-	1,665,674	1,665,674
10	Customers Accounts Expense	609,966	-	-	-	-	609,966	609,966
11	Sales Expenses	368,512	-	-	-	-	368,512	368,512
12	Administrative and General Expenses	2,191,875	59,643	519,917	-	298,436	1,313,879	1,612,315
13	Total Operating Expense	\$ 8,479,622	\$ 230,917	\$ 1,791,292	\$ 1,600,351	\$ 899,031	\$ 3,958,031	\$ 4,857,062
14	Depreciation Expense							
15	Steam Production Plant	\$ 133,971	\$ 133,971	-	-	-	-	-
16	Hydraulic Production Plant	552,476	-	552,476	-	-	-	-
17	Transmission Plant	309,252	-	-	-	309,252	-	309,252
18	Distribution Plant	727,810	-	-	-	-	727,810	727,810
19	General Plant	176,606	10,954	78,367	-	33,388	53,897	87,285
20	Total Depreciation Expense	\$ 1,900,115	\$ 144,925	\$ 630,843	\$ -	\$ 342,640	\$ 781,707	\$ 1,124,347
21	Taxes Other Than Income Taxes							
22	Social Security and Unemployment	\$ 93,852	\$ 2,694	\$ 25,728	\$ -	\$ 12,460	\$ 52,970	\$ 65,430
23	Property	2,786,762	184,788	1,230,243	-	527,362	844,369	1,371,731
24	Electric Gross Proceeds - Montana	361,800	-	-	-	-	361,800	361,800
25	Franchise	5,967	413	2,708	-	1,163	1,683	2,846
26	Capital Stock	42,000	2,905	19,062	-	8,183	11,850	20,033
27	Corporation License	226,705	15,684	102,890	-	44,170	63,961	108,131
28	City and County License	2,588	-	-	-	-	2,588	2,588
29	Telephone & Telegraph	3,505	95	831	-	477	2,102	2,579
30	Intrastate Utility	50	-	-	-	-	50	50
31	Total Taxes Other Than Income Taxes	\$ 3,523,229	\$ 206,579	\$ 1,381,462	\$ -	\$ 593,815	\$ 1,341,373	\$ 1,935,188
32	Income Taxes							
33	Federal	\$ 6,398,000	\$ 442,625	\$ 2,903,746	\$ -	\$ 1,246,554	\$ 1,805,075	\$ 3,051,629
34	State	161	-	-	-	-	161	161
35	Total Income Taxes	\$ 6,398,161	\$ 442,625	\$ 2,903,746	\$ -	\$ 1,246,554	\$ 1,805,236	\$ 3,051,790
36	Provision for Deferred Income Tax							
37	Accelerated Amortization	\$ 600,747	\$ -	\$ 600,747	\$ -	\$ -	\$ -	\$ -
38	Liberalized Depreciation	390,430	1,484	102,917	-	127,475	158,554	286,029
39	Total Provision for Def. Income Tax	\$ 991,177	\$ 1,484	\$ 703,664	\$ -	\$ 127,475	\$ 158,554	\$ 286,029
40	Other Electric Revenue	\$ ( 331,621)	\$ ( 19,364)	\$ ( 48,813)	\$ -	\$ ( 88,497)	\$ ( 174,947)	\$ ( 263,444)
41	Total Revenue Deductions	\$20,960,683	\$1,007,166	\$ 7,362,194	\$1,600,351	\$ 3,121,018	\$ 7,869,954	\$10,990,972
42	Operating Income	\$10,143,713	\$ 701,760	\$ 4,603,746	\$ -	\$ 1,976,350	\$ 2,861,857	\$ 4,838,207

THE  
MONTANA POWER COMPANY

Operating Income by Functions  
1960

SCHEDULE NO. 4 1567  
Sheet 3 of 7

Line No.	Description (1)	Total (2)	Steam (3)	Power Supply Hydraulic (4)	Other (5)	Transmission (6)	Distribution (7)	Total Transmission & Distribution (8)
1	Revenue from Sales of Electricity	\$33,385,624	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
2	Operating Expense							
3	Power Production Expenses							
4	Steam Power Generation	\$ 95,379	\$ 95,379	\$ -	\$ -	\$ -	\$ -	\$ -
5	Hydraulic Power Generation	1,287,486	-	1,287,486	-	-	-	-
6	Other Power Supply Expenses	1,758,932	-	-	1,758,932	-	-	-
7	Total Power Production Expense	\$ 3,141,797	\$ 95,379	\$ 1,287,486	\$ 1,758,932	\$ -	\$ -	\$ -
8	Transmission Expenses	\$ 627,363	\$ -	\$ -	\$ -	\$ 627,363	\$ -	\$ 627,363
9	Distribution Expenses	1,656,454	-	-	-	-	1,656,454	1,656,454
10	Customers Accounts Expenses	649,082	-	-	-	-	649,082	649,082
11	Sales Expenses	336,698	-	-	-	-	336,698	336,698
12	Administrative and General Expenses	2,316,837	31,956	560,368	-	330,896	1,393,617	1,724,513
13	Total Operating Expense	\$ 8,728,231	\$ 127,335	\$ 1,847,854	\$ 1,758,932	\$ 958,259	\$ 4,035,851	\$ 4,994,110
14	Depreciation Expense							
15	Steam Production Plant	\$ 134,001	\$ 134,001	\$ -	\$ -	\$ -	\$ -	\$ -
16	Hydraulic Production Plant	552,462	-	552,462	-	-	-	-
17	Transmission Plant	353,341	-	-	-	353,341	-	353,341
18	Distribution Plant	765,946	-	-	-	-	765,946	765,946
19	General Plant	184,709	12,064	79,252	-	36,116	57,277	93,393
20	Total Depreciation Expense	\$ 1,990,459	\$ 146,065	\$ 631,714	\$ -	\$ 389,457	\$ 823,223	\$ 1,212,680
21	Taxes Other Than Income Taxes							
22	Social Security and Unemployment	\$ 126,607	\$ 1,790	\$ 34,145	\$ -	\$ 18,386	\$ 72,286	\$ 90,672
23	Property	2,822,321	196,778	1,199,793	-	555,599	870,151	1,425,750
24	Electric Gross Proceeds - Montana	384,493	-	-	-	-	384,493	384,493
25	Franchise	6,903	506	3,002	-	1,406	1,989	3,395
26	Corporation License	639,276	46,889	277,963	-	130,184	184,240	314,424
27	City and County License	2,788	-	-	-	-	2,788	2,788
28	Telephone & Telegraph	3,713	51	898	-	530	2,234	2,764
29	Intrastate Utility	54	-	-	-	-	54	54
30	Total Taxes Other Than Income Taxes	\$ 3,986,155	\$ 246,014	\$ 1,515,801	\$ -	\$ 706,105	\$ 1,518,235	\$ 2,224,340
31	Income Taxes							
32	Federal	\$ 7,377,300	\$ 541,098	\$ 3,207,716	\$ -	\$ 1,502,338	\$ 2,126,148	\$ 3,628,486
33	State	192	-	-	-	-	192	192
34	Total Income Taxes	\$ 7,377,492	\$ 541,098	\$ 3,207,716	\$ -	\$ 1,502,338	\$ 2,126,340	\$ 3,628,678
35	Provision for Deferred Income Taxes							
36	Accelerated Amortization	\$ 608,209	\$ -	\$ 608,209	\$ -	\$ -	\$ -	\$ -
37	Liberalized Depreciation	447,000	1,922	110,945	-	138,123	196,010	334,133
38	Total Provision for Def. Income Taxes	\$ 1,055,209	\$ 1,922	\$ 719,154	\$ -	\$ 138,123	\$ 196,010	\$ 334,133
39	Other Electric Revenue	\$ ( 337,797 )	\$ ( 18,791 )	\$ ( 42,169 )	\$ -	\$ ( 90,395 )	\$ ( 186,442 )	\$ ( 276,837 )
40	Total Revenue Deductions	\$ 22,799,749	\$ 1,043,643	\$ 7,880,070	\$ 1,758,932	\$ 3,603,887	\$ 8,513,217	\$ 12,117,104
41	Operating Income	\$ 10,585,875	\$ 776,435	\$ 4,602,833	\$ -	\$ 2,155,742	\$ 3,050,865	\$ 5,206,607



THE  
MONTANA POWER COMPANY  
Operating Income by Functions  
Year 1961

Line No.	Description (1)	Total (2)	Power Supply			Transmission (6)	Distribution (7)	Total Transmission & Distribution (8)
			Steam (3)	Hydraulic (4)	Other (5)			
1	Revenue from Sales of Electricity	\$34,998,769	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
2	Operating Expense							
3	Power Production Expenses							
4	Steam Power Generation	\$ 99,320	\$ 99,320	\$ -	\$ -	\$ -	\$ -	\$ -
5	Hydraulic Power Generation	1,129,203	-	1,129,203	-	-	-	-
6	Other Power Supply Expenses	1,920,907	-	-	1,920,907	-	-	-
7	Total Power Production Expense	\$ 3,149,430	\$ 99,320	\$ 1,129,203	\$ 1,920,907	\$ -	\$ -	\$ -
8	Transmission Expenses	\$ 467,257	\$ -	\$ -	\$ -	\$ 467,257	\$ -	\$ 467,257
9	Distribution Expenses	1,580,098	-	-	-	-	1,580,098	1,580,098
10	Customers Accounting Expenses	665,191	-	-	-	-	665,191	665,191
11	Sales Expenses	370,596	-	-	-	-	370,596	370,596
12	Administrative and General Expenses	2,387,218	35,923	527,030	-	276,471	1,547,794	1,824,265
13	Total Operating Expense	\$ 8,619,790	\$ 135,243	\$ 1,656,233	\$ 1,920,907	\$ 743,728	\$ 1,163,679	\$ 4,907,407
14	Depreciation Expense							
15	Steam Production Plant	\$ 134,764	\$ 134,764	\$ -	\$ -	\$ -	\$ -	\$ -
16	Hydraulic Production Plant	553,223	-	553,223	-	-	-	-
17	Transmission Plant	357,177	-	-	-	357,177	-	357,177
18	Distribution Plant	809,726	-	-	-	-	809,726	809,726
19	General Plant	191,314	12,286	80,294	-	37,077	61,657	98,734
20	Total Depreciation Expense	\$ 2,046,204	\$ 147,050	\$ 663,517	\$ -	\$ 394,254	\$ 871,383	\$ 1,265,637
21	Taxes Other Than Income Taxes							
22	Social Security and Unemployment	\$ 135,035	\$ 1,313	\$ 34,674	\$ -	\$ 17,979	\$ 81,069	\$ 99,048
23	Property	3,199,589	217,842	1,330,060	-	620,939	1,030,748	1,651,687
24	Electric Gross Proceeds - Montana	408,059	-	-	-	-	408,059	408,059
25	Franchise	7,837	567	3,324	-	1,584	2,362	3,946
26	Corporation License	649,126	46,985	275,280	-	131,161	195,700	326,861
27	City and County License	2,688	-	-	-	-	2,688	2,688
28	Telephone & Telegraph	2,789	42	616	-	323	1,808	2,131
29	Intrastate Utility	40	-	-	-	-	40	40
30	Total Taxes Other Than Income Taxes	\$ 4,405,163	\$ 266,749	\$ 1,643,954	\$ -	\$ 771,986	\$ 1,722,474	\$ 2,494,460
31	Income Taxes							
32	Federal	\$ 7,939,400	\$ 574,665	\$ 3,366,927	\$ -	\$ 1,604,219	\$ 2,393,589	\$ 3,997,808
33	State	524	-	-	-	-	524	524
34	Total Income Taxes	\$ 7,939,924	\$ 574,665	\$ 3,366,927	\$ -	\$ 1,604,219	\$ 2,394,113	\$ 3,998,332
35	Provision for Deferred Income Taxes							
36	Accelerated Amortization	\$ 605,133	\$ -	\$ 605,133	\$ -	\$ -	\$ -	\$ -
37	Liberalized Depreciation	498,794	3,093	112,478	-	145,149	238,074	383,223
38	Total Provision for Def. Income Taxes	\$ 1,103,927	\$ 3,093	\$ 717,611	\$ -	\$ 145,149	\$ 238,074	\$ 383,223
39	Other Electric Revenue	\$( 398,595)	\$( 16,763)	\$( 88,721)	\$ -	\$( 93,381)	\$( 199,730)	\$( 293,111)
40	Total Revenue Deductions	\$23,716,413	\$ 1,110,037	\$ 7,929,521	\$ 1,920,907	\$ 3,565,955	\$ 9,189,993	\$12,755,948
41	Operating Income	\$11,282,356	\$ 816,633	\$ 4,784,601	\$ -	\$ 2,279,690	\$ 3,401,432	\$ 5,681,122

THE  
MONTANA POWER COMPANY

Operating Income by Functions  
Year 1962

SCHEDULE NO. 4 1569  
Sheet 5 of 7

Line No.	Description (1)	Total (2)	Power Supply			Transmission (6)	Distribution (7)	Total Transmission & Distribution (8)
			Steam (3)	Hydraulic (4)	Other (5)			
1	Revenue from Sales of Electricity	\$36,970,396	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
2	Operating Expense							
3	Power Production Expenses							
4	Steam Power Generation	\$ 205,355	\$ 205,355	\$ -	\$ -	\$ -	\$ -	\$ -
5	Hydraulic Power Generation	1,192,059	-	1,192,059	-	-	-	-
6	Other Power Supply Expenses	1,521,163	-	-	1,521,163	-	-	-
7	Total Power Production Expenses	\$ 2,918,577	\$ 205,355	\$ 1,192,059	\$ 1,521,163	\$ -	\$ -	\$ -
8	Transmission Expenses	\$ 660,387	\$ -	\$ -	\$ -	\$ 660,387	\$ -	\$ 660,387
9	Distribution Expenses	1,799,441	-	-	-	-	1,799,441	1,799,441
10	Customer Accounts Expenses	711,922	-	-	-	-	711,922	711,922
11	Sales Expenses	382,020	-	-	-	-	382,020	382,020
12	Administrative and General Expenses	2,632,806	67,925	542,651	-	375,785	1,646,445	2,022,230
13	Total Operating Expense	\$ 9,105,153	\$ 273,280	\$ 1,734,710	\$ 1,521,163	\$ 1,036,172	\$ 4,539,828	\$ 5,576,000
14	Depreciation Expense							
15	Steam Production Plant	\$ 137,452	\$ 137,452	\$ -	\$ -	\$ -	\$ -	\$ -
16	Hydraulic Production Plant	549,285	-	549,285	-	-	-	-
17	Transmission Plant	364,128	-	-	-	364,128	-	364,128
18	Distribution Plant	875,289	-	-	-	-	875,289	875,289
19	General Plant	209,944	13,246	85,682	-	41,300	69,716	111,016
20	Total Depreciation Expense	\$ 2,136,098	\$ 150,698	\$ 634,967	\$ -	\$ 405,428	\$ 945,005	\$ 1,350,433
21	Taxes Other Than Income Taxes							
22	Social Security and Unemployment	\$ 105,962	\$ 3,288	\$ 23,320	\$ -	\$ 13,143	\$ 66,211	\$ 79,354
23	Property	3,427,099	227,593	1,381,942	-	674,257	1,143,307	1,817,564
24	Electric Gross Proceeds - Montana	433,732	-	-	-	-	433,732	433,732
25	Franchise	7,303	521	2,995	-	1,502	2,285	3,787
26	Corporation License	696,755	49,749	285,778	-	143,251	217,977	361,228
27	City and County License	2,878	-	-	-	-	2,878	2,878
28	Telephone & Telegraph	3,368	87	694	-	481	2,106	2,587
29	Intrastate Utility	51	-	-	-	-	51	51
30	Total Taxes Other Than Income	\$ 4,677,148	\$ 281,238	\$ 1,694,729	\$ -	\$ 832,634	\$ 1,868,547	\$ 2,701,181
31	Income Taxes							
32	Federal	\$ 8,031,200	\$ 573,434	\$ 3,294,037	\$ -	\$ 1,651,203	\$ 2,512,526	\$ 4,163,729
33	State	423	-	-	-	-	423	423
34	Total Income Taxes	\$ 8,031,623	\$ 573,434	\$ 3,294,037	\$ -	\$ 1,651,203	\$ 2,512,949	\$ 4,164,152
35	Provision for Deferred Income Taxes							
36	Accelerated Amortization	\$ 605,133	\$ -	\$ 605,133	\$ -	\$ -	\$ -	\$ -
37	Liberalized Depreciation	572,692	3,322	117,516	-	174,843	277,011	451,854
38	Total Provision for Def. Income Taxes	\$ 1,177,825	\$ 3,322	\$ 722,649	\$ -	\$ 174,843	\$ 277,011	\$ 451,854
39	Investment Tax Credit	\$ 150,000	\$ 870	\$ 30,780	\$ -	\$ 45,795	\$ 72,555	\$ 118,350
40	Other Electric Revenue	\$ ( 422,783)	\$ ( 20,396)	\$ ( 115,324)	\$ -	\$ ( 93,210)	\$ ( 193,853)	\$ ( 287,063)
41	Total Revenue Deductions	\$24,855,064	\$1,262,446	\$7,996,548	\$1,521,163	\$4,052,865	\$10,022,042	\$14,074,907
42	Operating Income	\$12,115,332	\$ 865,045	\$4,969,164	\$ -	\$2,490,894	\$ 3,790,229	\$ 6,281,123

THE  
MONTANA POWER COMPANY

SCHEDULE NO. 4  
Sheet 6 of 7

Operating Income by Functions  
Year 1963

Line No.	Description (1)	Total (2)	Power Supply			Transmission (6)	Distribution (7)	Total Transmission & Distribution (8)
			Steam (3)	Hydraulic (4)	Other (5)			
1	Revenue from Sales of Electricity	\$37,583,110	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
2	Operating Expense							
3	Power Production Expense							
4	Steam Power Generation	\$ 226,554	\$ 226,554	\$ -	\$ -	\$ -	\$ -	\$ -
5	Hydraulic Power Generation	1,355,972	-	1,355,972	-	-	-	-
6	Other Power Supply Expenses	1,458,876	-	-	1,458,876	-	-	-
7	Total Power Production Expense	\$ 3,041,402	\$ 226,554	\$1,355,972	\$1,458,876	\$ -	\$ -	\$ -
8	Transmission Expenses	\$ 701,528	\$ -	\$ -	\$ -	\$ 701,528	\$ -	\$ 701,528
9	Distribution Expenses	1,915,318	-	-	-	-	1,915,318	1,915,318
10	Customers Accounts Expenses	769,723	-	-	-	-	769,723	769,723
11	Sales Expenses	469,495	-	-	-	-	469,495	469,495
12	Administrative and General Expenses	2,821,791	73,196	530,171	-	403,595	1,814,829	2,218,424
13	Total Operating Expense	\$ 9,719,257	\$ 299,750	\$1,886,143	\$1,458,876	\$1,105,123	\$4,969,365	\$ 6,074,488
14	Depreciation Expense							
15	Steam Production Plant	\$ 137,692	\$ 137,692	\$ -	\$ -	\$ -	\$ -	\$ -
16	Hydraulic Production Plant	548,604	-	548,604	-	-	-	-
17	Transmission Plant	388,613	-	-	-	388,613	-	388,613
18	Distribution Plant	918,417	-	-	-	-	918,417	918,417
19	General Plant	230,591	14,291	91,449	-	46,714	78,137	124,851
20	Total Depreciation Expense	\$ 2,223,917	\$ 151,983	\$ 640,053	\$ -	\$ 435,327	\$ 996,554	\$ 1,431,881
21	Taxes Other Than Income Taxes							
22	Social Security and Unemployment	\$ 122,784	\$ 2,612	\$ 27,768	\$ -	\$ 16,732	\$ 75,672	\$ 92,404
23	Property	3,475,312	225,046	1,358,736	-	704,027	1,187,503	1,891,530
24	Electric Gross Proceeds - Montana	443,534	-	-	-	-	443,534	443,534
25	Corporation License	735,907	51,619	291,522	-	155,956	236,810	392,766
26	City and County License	2,898	-	-	-	-	2,898	2,898
27	Telephone & Telegraph	2,972	77	558	-	425	1,912	2,337
28	Intrastate Utility	77	-	-	-	-	77	77
29	Total Taxes Other Than Income Taxes	\$ 4,783,484	\$ 279,354	\$1,678,584	\$ -	\$ 877,140	\$1,948,406	\$ 2,825,546
30	Income Taxes							
31	Federal	\$ 8,015,842	\$ 562,259	\$3,175,388	\$ -	\$1,698,748	\$2,579,447	\$ 4,278,195
32	State	196	-	-	-	-	196	196
33	Total Income Taxes	\$ 8,016,038	\$ 562,259	\$3,175,388	\$ -	\$1,698,748	\$2,579,643	\$ 4,278,391
34	Provision for Deferred Income Taxes							
35	Accelerated Amortization	\$ 321,033	\$ -	\$ 321,033	\$ -	\$ -	\$ -	\$ -
36	Liberalized Depreciation	445,507	2,495	83,622	-	137,840	221,550	359,390
37	Total Provision for Def. Income Taxes	\$ 766,540	\$ 2,495	\$ 404,655	\$ -	\$ 137,840	\$ 221,550	\$ 359,390
38	Investment Tax Credit	\$ 156,998	\$ 879	\$ 29,469	\$ -	\$ 48,575	\$ 78,075	\$ 126,650
39	Other Electric Revenue	\$ ( 481,743)	\$ ( 13,706)	\$ ( 175,031)	\$ -	\$ ( 94,971)	\$ ( 198,035)	\$ ( 293,006)
40	Total Revenue Deductions	\$25,184,491	\$1,283,014	\$7,639,261	\$1,458,876	\$4,207,782	\$10,595,558	\$14,803,340
41	Operating Income	\$12,398,619	\$ 869,682	\$4,911,577	\$ -	\$2,627,563	\$3,989,797	\$ 6,617,360



THE  
MONTANA POWER COMPANY

SCHEDULE NO. 4  
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Operating Income by Functions  
Year 1964

Line No.	Description (1)	Total (2)	Power Supply			Transmission (6)	Distribution (7)	Total Transmission & Distribution (8)
			Steam (3)	Hydraulic (4)	Other (5)			
1	Revenue from Sales of Electricity	\$38,850,646						
2	Operating Expense							
3	Power Production Expenses							
4	Steam Power Generation	\$ 211,739	\$ 211,739	\$ -	\$ -	\$ -	\$ -	\$ -
5	Hydraulic Power Generation	1,481,811	-	1,481,811	-	-	-	-
6	Other Power Supply Expenses	1,574,983	-	-	1,574,983	-	-	-
7	Total Power Production Expense	\$ 3,268,533	\$ 211,739	\$ 1,481,811	\$ 1,574,983	\$ -	\$ -	\$ -
8	Transmission Expenses	\$ 749,514	\$ -	\$ -	\$ -	\$ 749,514	\$ -	\$ 749,514
9	Distribution Expenses	1,995,183	-	-	-	-	1,995,183	1,995,183
10	Customer Accounts Expenses	780,430	-	-	-	-	780,430	780,430
11	Sales Expenses	489,811	-	-	-	-	489,811	489,811
12	Administrative and General Expenses	2,479,682	60,138	500,420	-	358,265	1,560,859	1,919,124
13	Total Operating Expense	\$ 9,763,153	\$ 271,877	\$ 1,982,231	\$ 1,574,983	\$ 1,107,779	\$ 4,826,283	\$ 5,934,062
14	Depreciation Expense							
15	Steam Production Plant	\$ 143,965	\$ 143,965	\$ -	\$ -	\$ -	\$ -	\$ -
16	Hydraulic Production Plant	701,554	-	701,554	-	-	-	-
17	Transmission Plant	437,783	-	-	-	437,783	-	437,783
18	Distribution Plant	1,031,533	-	-	-	-	1,031,533	1,031,533
19	General Plant	285,280	16,079	110,829	-	58,700	99,672	158,372
20	Total Depreciation Expense	\$ 2,600,115	\$ 160,044	\$ 812,383	\$ -	\$ 496,483	\$ 1,131,205	\$ 1,627,688
21	Taxes Other Than Income Taxes							
22	Social Security and Unemployment	\$ 116,967	\$ 2,185	\$ 26,518	\$ -	\$ 16,667	\$ 71,597	\$ 88,264
23	Property	3,411,444	196,706	1,305,914	-	701,912	1,206,912	1,908,824
24	Electric Gross Proceeds - Montana	467,057	-	-	-	-	467,057	467,057
25	Corporation License	742,717	46,536	288,034	-	160,044	248,103	408,147
26	City and County License	2,838	-	-	-	-	2,838	2,838
27	Telephone & Telegraph	3,167	77	639	-	458	1,993	2,451
28	Intrastate Utility	47	-	-	-	-	47	47
29	Total Taxes Other Than Income Taxes	\$ 4,744,237	\$ 245,504	\$ 1,621,105	\$ -	\$ 879,081	\$ 1,998,547	\$ 2,877,628
30	Income Taxes							
31	Federal	\$ 8,597,035	\$ 538,654	\$ 3,334,025	\$ -	\$ 1,852,530	\$ 2,871,826	\$ 4,724,356
32	State	10	-	-	-	-	10	10
33	Total Income Taxes	\$ 8,597,045	\$ 538,654	\$ 3,334,025	\$ -	\$ 1,852,530	\$ 2,871,836	\$ 4,724,366
34	Provision for Deferred Income Taxes							
35	Accelerated Amortization	\$ ( 76,500)	\$ -	\$ ( 76,500)	\$ -	\$ -	\$ -	\$ -
36	Liberalized Depreciation	-	-	-	-	-	-	-
37	Total Provision for Def. Income Taxes	\$ ( 76,500)	\$ -	\$ ( 76,500)	\$ -	\$ -	\$ -	\$ -
38	Investment Tax Credit	\$ 122,054	\$ 647	\$ 21,372	\$ -	\$ 37,019	\$ 63,016	\$ 100,035
39	Other Electric Revenue	\$ ( 526,967)	\$ ( 4,350)	\$ ( 198,095)	\$ -	\$ ( 119,868)	\$ ( 204,654)	\$ ( 324,522)
40	Total Revenue Deductions	\$25,223,137	\$1,212,376	\$7,496,521	\$1,574,983	\$4,253,024	\$10,686,233	\$14,939,257
41	Operating Income	\$13,627,509	\$ 853,843	\$5,284,898	\$ -	\$2,936,520	\$4,552,248	\$ 7,488,768

THE  
MONTANA POWER COMPANY  
Rate Base by Functions  
1958

Line No.	Description (1)	Balance 12/31/57 (2)	Balance 12/31/58 (3)	Average (4)	Steam Production (5)	Hydraulic Production (6)	Transmission (7)	Distribution (8)
1	<u>Electric Plant in Service</u>							
2	Intangible Plant	\$ 69,047	\$ 69,047	\$ 69,047	\$ 1,240	\$ 53,529	\$ 6,170	\$ 3,108
3	Steam Production	\$ 5,822,584	\$ 5,825,244	\$ 5,823,914	\$ 5,823,914	\$ -	\$ -	\$ -
4	Hydraulic Production	51,163,741	61,607,805	56,385,773	-	56,385,773	-	-
5	Total Production Plant	\$ -	\$ -	\$62,209,687	\$ 5,823,914	\$56,385,773	\$ -	\$ -
6	Transmission Plant	\$23,796,671	\$24,552,047	\$24,174,359	\$ -	\$ -	24,174,359	\$ -
7	Distribution Plant	39,892,561	41,337,136	40,614,849	-	-	-	40,614,849
8	General Plant	5,348,705	5,916,399	5,632,552	342,681	2,461,510	1,055,327	1,773,034
9	Other Tangible Property	2,023,984	2,027,752	2,025,868	2,025,868	-	-	-
10	Total Electric Plant in Service	\$ -	\$ -	\$134,726,362	\$ 8,193,703	\$58,900,812	\$25,235,856	\$42,395,991
11	<u>Accumulated Depreciation &amp; Amortization</u>							
12	Steam Production	\$ 765,674	\$ 899,279	\$ 832,477	\$ 832,477	\$ -	\$ -	\$ -
13	Hydraulic Production	10,227,747	10,608,305	10,418,026	-	10,418,026	-	-
14	Transmission	4,160,025	4,355,757	4,257,891	-	-	4,257,891	-
15	Distribution	6,840,030	7,313,784	7,076,907	-	-	-	7,076,907
16	General	2,271,623	2,446,255	2,358,939	143,516	1,030,892	441,976	742,555
17	Total	\$ -	\$ -	\$24,944,240	\$ 975,993	\$11,448,918	\$ 4,699,867	\$ 7,819,462
18	<u>Net Plant</u>	\$ -	\$ -	\$109,782,122	\$ 7,217,710	\$47,451,894	\$20,535,989	\$34,576,529
19	<u>Customers Advances for Construction</u>	\$ 184,179	\$ 241,315	\$ 212,765	\$ -	\$ -	\$ -	\$ 212,765
20	<u>Contributions in Aid of Construction</u>	\$ 3,083,153	\$ 3,164,105	\$ 3,123,629	\$ -	\$ -	\$ -	\$ 3,123,629
21	<u>Accumulated Deferred Income Taxes</u>							
22	Accelerated Amortization	\$ 442,355	\$ 744,430	\$ 593,392	\$ -	\$ 593,392	\$ -	\$ -
23	Liberalized Depreciation	-	243,323	121,662	499	37,849	33,895	49,419
24	Total Accumulated Deferred Income Taxes	-	-	\$ 715,054	\$ 499	\$ 631,241	\$ 33,895	\$ 49,419
25	<u>Working Capital</u>							
26	12.5% of Operating Expenses Less							
	Purchased Power	\$ -	\$ -	\$ 823,383				
27	Prepayments	-	-	35,966				
28	Materials and Supplies	-	-	1,377,502				
29	Total	-	-	\$ 2,236,851				
30	Income Tax Credit (50%)	-	-	\$(3,221,650)				
31	Total Working Capital	-	-	-0-				
32	<u>Total Rate Base</u>			\$105,730,674	\$ 7,217,211	\$43,320,653	\$20,562,094	\$31,190,716

THE  
MONTANA POWER COMPANY

SCHEDULE NO. 5  
Sheet 2 of 7

1573

Rate Base by Functions  
1959

Line No.	Description (1)	Balance 12/31/58 (2)	Balance 12/31/59 (3)	Average (4)	Steam Production (5)	Hydraulic Production (6)	Transmission (7)	Distribution (8)
1	<u>Electric Plant in Service</u>							
2	Intangible Plant	\$ 69,047	\$ 69,047	\$ 69,047	\$ 1,240	\$ 53,529	\$ 6,170	\$ 8,108
3	Steam Production	\$ 5,825,244	\$ 5,839,632	\$ 5,832,438	5,832,438	\$ -	\$ -	\$ -
4	Hydraulic Production	61,607,805	61,618,455	61,613,130		61,613,130	\$ -	\$ -
5	Total Production Plant	-	-	\$ 67,445,568	\$ 5,832,438	\$ 61,613,130	\$ -	\$ -
6	Transmission Plant	\$24,552,047	\$27,948,642	\$ 26,250,344	\$ -	\$ -	\$26,250,344	\$ -
7	Distribution Plant	41,337,136	43,411,926	42,374,532	-	-	-	42,374,532
8	General Plant	5,916,399	7,035,975	6,476,187	401,676	2,873,736	1,224,359	1,976,416
9	Other Tangible Property	2,027,752	3,531,288	2,779,520	2,779,520	-	-	-
10	Total Plant in Service	-	-	\$145,395,198	\$ 9,014,874	\$64,540,395	\$27,480,873	\$44,359,056
11	<u>Accumulated Depreciation &amp; Amortization</u>							
12	Steam Production	\$ 899,279	\$ 1,033,250	\$ 966,264	\$ 966,264	\$ -	\$ -	\$ -
13	Hydraulic Production	10,608,305	11,147,270	10,877,788	-	10,877,788	-	-
14	Transmission	4,355,757	4,605,350	4,480,553	-	-	4,480,553	-
15	Distribution	7,313,784	7,739,171	7,526,477	-	-	-	7,526,477
16	General	2,446,255	2,628,815	2,537,535	157,387	1,126,003	479,735	774,410
17	Total			\$ 26,388,617	\$ 1,123,651	\$12,003,791	\$ 4,960,288	\$ 8,300,887
18	<u>Net Plant</u>			\$119,006,581	\$ 7,891,223	\$52,536,604	\$22,520,585	\$36,058,169
19	<u>Customer Advances For Construction</u>	\$ 241,351	\$ 314,454	\$ 277,903	\$ -	\$ -	\$ -	\$ 277,903
20	<u>Contributions in Aid of Construction</u>	\$ 3,164,105	\$ 3,299,809	\$ 3,231,957	\$ -	\$ -	\$ -	\$ 3,231,957
21	<u>Accumulated Deferred Income Taxes</u>							
22	Accelerated Depreciation	\$ 243,323	\$ 844,070	\$ 543,696	\$ -	\$ 543,696	\$ -	\$ -
23	Liberalized Depreciation	744,430	1,134,860	939,645	3,571	247,690	306,794	381,590
24	Total Accumulated Deferred Income Taxes	-	-	\$ 1,483,341	\$ 3,571	\$ 791,386	\$ 306,794	\$ 381,590
25	<u>Working Capital</u>							
26	12.5% of Operating Expenses less							
	Purchased Power	\$ -	\$ -	\$ 859,909	\$ -	\$ -	\$ -	\$ -
27	Prepayments	-	-	50,954	-	-	-	-
28	Materials and Supplies	-	-	1,392,140	-	-	-	-
29	Total	-	-	\$ 2,303,003	-	-	-	-
30	Income Tax Credit - (50%)	-	-	\$( 3,199,000)	-	-	-	-
31	Total Working Capital	-	-	\$ -0-	-	-	-	-
32	<u>Total Rate Base</u>			\$114,013,380	\$ 7,887,652	\$51,745,218	\$22,213,791	\$32,166,719

THE  
MONTANA POWER COMPANY

Rate Base by Functions  
1960

Line No.	Description (1)	Balance 12/31/59 (2)	Balance 12/31/60 (3)	Average (4)	Steam Production (5)	Hydraulic Production (6)	Transmission (7)	Distribution (8)
1	<u>Electric Plant In Service</u>							
2	Intangible Plant	\$ 69,047	\$ 69,047	\$ 69,047	\$ 1,240	\$ 53,529	\$ 6,170	\$ 8,108
3	Steam Production	\$ 5,839,632	\$ 5,870,944	\$ 5,855,288	\$ 5,855,288	\$ -	\$ -	\$ -
4	Hydraulic Production	61,618,455	61,725,985	61,672,220	-	61,672,220	-	-
5	Total Production Plant	-	-	67,527,508	5,855,288	61,672,220	\$ -	\$ -
6	Transmission Plant	\$27,948,642	\$28,259,930	\$ 28,104,286	\$ -	\$ -	\$28,104,286	\$ -
7	Distribution Plant	43,411,926	45,731,009	44,571,468	-	-	-	44,571,468
8	General Plant	7,035,975	7,391,522	7,213,748	471,158	3,095,175	1,410,484	2,236,931
9	Other Tangible Property	3,531,288	3,534,042	3,532,665	3,532,665	-	-	-
10	Total Electric Plant in Service	-	-	\$151,018,722	\$ 9,860,351	\$64,820,924	\$29,520,940	\$46,816,507
11	<u>Accumulated Depreciation &amp; Amortization</u>							
12	Steam Production	\$ 1,033,250	\$1,167,251	\$ 1,100,250	\$ 1,100,250	\$ -	\$ -	\$ -
13	Hydraulic Production	11,147,270	11,503,440	11,325,355	-	11,325,355	-	-
14	Transmission	4,605,350	4,908,395	4,756,872	-	-	4,756,872	-
15	Distribution	7,739,171	8,304,334	8,021,753	-	-	-	8,021,753
16	General	2,628,815	2,796,632	2,712,724	177,179	1,163,938	530,411	841,196
17	Total	-	-	\$ 27,916,954	\$ 1,277,429	\$12,489,293	\$ 5,287,283	\$ 8,862,949
18	<u>Net Plant</u>	-	-	\$123,101,768	\$ 8,582,922	\$52,331,631	\$24,233,657	\$37,953,558
19	<u>Customers Advances for Construction</u>	\$ 314,454	\$ 307,623	\$ 311,039	\$ -	\$ -	\$ -	\$ 311,039
20	<u>Contributions in Aid of Construction</u>	\$ 3,299,809	\$ 3,389,732	\$ 3,344,770	\$ -	\$ -	\$ -	\$ 3,344,770
21	<u>Accumulated Deferred Income Taxes</u>							
22	Accelerated Amortization	\$ 844,070	\$ 1,452,279	\$ 1,148,175	\$ -	\$ 1,148,175	\$ -	\$ -
23	Liberalized Depreciation	\$ 1,134,860	\$ 1,581,860	\$ 1,358,360	\$ 5,841	\$ 337,145	\$ 419,733	\$ 595,641
24	Total Accumulated Def. Income Taxes	-	-	\$ 2,506,535	\$ 5,841	\$ 1,485,320	\$ 419,733	\$ 595,641
25	<u>Working Capital</u>							
26	12.5% of Operating Expenses less Purchased Power	-	-	\$ 871,162	-	-	-	-
27	Prepayments	-	-	59,404	-	-	-	-
28	Materials and Supplies	-	-	1,395,590	-	-	-	-
29	Total	-	-	\$ 2,326,156	-	-	-	-
30	Income Tax Credit (50%)	-	-	\$( 3,688,650)	-	-	-	-
31	Total Working Capital	-	-	\$ -0-	-	-	-	-
32	<u>Total Rate Base</u>			<u>\$116,939,424</u>	<u>\$ 8,577,081</u>	<u>\$50,846,311</u>	<u>\$23,813,924</u>	<u>\$33,702,108</u>

THE  
MONTANA POWER COMPANY

SCHEDULE NO. 51575  
Sheet 4 of 7

Rate Base by Functions  
1961

Line No.	Description (1)	Balance 13/31/60 (2)	Balance 12/31/61 (3)	Average (4)	Steam Production (5)	Hydraulic Production (6)	Transmission (7)	Distribution (8)
1	<u>Electric Plant In Service</u>							
2	Intangible Plant	\$ 69,047	\$ 69,047	\$ 69,047	\$ 1,240	\$ 53,529	\$ 6,170	\$ 8,108
3	Steam Production	\$ 5,870,944	\$ 5,977,258	\$ 5,924,101	\$ 5,924,101	\$ -	\$ -	\$ -
4	Hydraulic Production	61,725,985	61,828,605	61,777,295	-	61,777,295	-	-
5	Total Production	-	-	\$ 67,701,396	\$ 5,924,101	\$ 61,777,295	\$ -	\$ -
6	Transmission Plant	\$28,259,930	\$28,793,727	\$ 28,526,829	\$ -	\$ -	\$28,526,829	\$ -
7	Distribution Plant	45,731,009	49,146,407	47,438,708	-	-	-	47,438,708
8	General Plant	7,391,522	7,694,268	7,542,895	484,378	3,165,726	1,461,834	2,430,957
9	Other Tangible Property	3,534,042	3,522,438	3,528,240	3,528,240	-	-	-
10	Total Electric Plant in Service	-	-	\$154,807,115	\$ 9,937,959	\$64,996,550	\$29,994,833	\$49,877,773
11	<u>Accumulated Depreciation &amp; Amortization</u>							
12	Steam Production	\$ 1,167,251	\$ 1,302,016	\$ 1,234,634	\$ 1,234,634	\$ -	\$ -	\$ -
13	Hydraulic Production	11,503,440	12,051,464	11,777,452	-	11,777,452	-	-
14	Transmission	4,908,395	5,402,911	5,155,653	-	-	5,155,653	-
15	Distribution	8,304,334	8,982,647	8,643,490	-	-	-	8,643,490
16	General	2,796,632	2,982,748	2,889,690	185,565	1,212,793	560,030	931,302
17	Total	-	-	\$ 29,700,919	\$ 1,420,199	\$12,990,245	\$ 5,715,683	\$ 9,574,792
18	<u>Net Plant</u>			\$125,106,196	\$ 8,517,760	\$52,006,305	\$24,279,150	\$40,302,981
19	<u>Customers Advances for Construction</u>	\$ 307,623	\$ 822,668	\$ 565,146	\$ -	\$ -	\$ -	\$ 565,146
20	<u>Contributions in Aid of Construction</u>	\$ 3,389,732	\$ 3,476,200	\$ 3,432,966	\$ -	\$ -	\$ -	\$ 3,432,966
21	<u>Accumulated Deferred Income Taxes</u>							
22	Accelerated Amortization	\$ 1,452,279	\$ 2,057,412	\$ 1,754,845	\$ -	\$ 1,754,845	\$ -	\$ -
23	Liberalized Depreciation	1,581,860	2,080,654	1,831,257	11,354	412,948	532,896	874,059
24	Total Accumulated Def. Income Taxes	-	-	\$ 3,586,102	\$ 11,354	\$ 2,167,793	\$ 532,896	\$ 874,059
25	<u>Working Capital</u>							
26	12.5% of Operating Expense Less							
	Purchased Power	-	-	\$ 837,453	-	-	-	-
27	Prepayments	-	-	62,202	-	-	-	-
28	Materials and Supplies	-	-	1,421,756	-	-	-	-
29	Total	-	-	\$ 2,321,411	-	-	-	-
30	Income Tax Credit (50%)	-	-	( 3,969,700)	-	-	-	-
31	Total Working Capital	-	-	\$ -0-	-	-	-	-
32	<u>Total Rate Base</u>			\$117,521,982	\$ 8,506,406	\$49,838,512	\$23,746,254	\$35,430,810



THE  
MONTANA POWER COMPANYRate Base by Functions  
1962

Line No.	Description (1)	Balance 12/31/61 (2)	Balance 12/31/62 (3)	Average (4)	Steam Production (5)	Hydraulic Production (6)	Transmission (7)	Distribution (8)
1	<u>Electric Plant in Service</u>							
2	Intangible Plant	\$ 69,047	\$ 69,047	\$ 69,047	\$ 1,240	\$ 53,529	\$ 6,170	\$ 8,108
3	Steam Production	5,977,258	5,986,243	5,981,750	5,981,750	-	-	-
4	Hydraulic Production	61,828,605	61,773,114	61,800,860	-	61,800,860	-	-
5	Total Production	-	-	\$ 67,782,610	\$ 5,981,750	\$ 61,800,860	\$ -	\$ -
6	Transmission Plant	\$28,793,727	\$30,784,922	\$ 29,789,325	\$ -	\$ -	\$29,789,325	\$ -
7	Distribution Plant	49,146,407	51,424,454	50,285,431	-	-	-	50,285,431
8	General Plant	7,694,268	7,982,152	7,838,210	494,548	3,198,891	1,541,933	2,602,838
9	Other Tangible Property	3,522,438	3,622,864	3,572,651	3,572,651	-	-	-
10	Total Electric Plant in Service			\$159,337,274	\$10,050,189	\$65,053,280	\$31,337,428	\$52,896,377
11	<u>Accumulated Depreciation and Amortization</u>							
12	Steam Production	\$ 1,302,016	\$ 1,439,392	\$ 1,370,704	\$ 1,370,704	\$ -	\$ -	\$ -
13	Hydraulic Production	12,051,464	12,498,005	12,274,734	-	12,274,734	-	-
14	Transmission	5,402,911	5,784,859	5,593,885	-	-	5,593,885	-
15	Distribution	8,982,647	9,515,021	9,248,834	-	-	-	9,248,834
16	General	2,982,748	3,165,064	3,073,906	193,947	1,254,507	604,699	1,020,753
17	Total	-	-	\$ 31,562,063	\$ 1,564,651	\$13,529,241	\$ 6,198,584	\$10,269,587
18	Net Plant	-	-	\$127,775,211	\$ 8,485,538	\$51,524,039	\$25,138,844	\$42,626,790
19	<u>Customers Advances for Construction</u>	\$ 822,668	\$ 837,119	\$ 829,893	-	-	-	829,893
20	<u>Contributions in Aid of Construction</u>	\$ 3,476,200	\$ 3,519,855	3,498,027	-	-	-	3,498,027
21	<u>Accumulated Deferred Income Taxes</u>							
22	Accelerated Amortization	\$ 2,057,412	\$ 2,662,545	\$ 2,359,978	\$ -	\$ 2,359,978	\$ -	\$ -
23	Liberalized Depreciation	2,080,654	2,653,346	2,367,000	13,729	485,708	722,645	1,144,918
24	Total Accumulated Def. Income Taxes	-	-	\$ 4,726,978	\$ 13,729	\$ 2,845,686	\$ 722,645	\$ 1,144,918
25	<u>Accumulated Deferred Investment Tax Credit</u>	-	\$ 150,000	\$ 75,000	\$ 435	\$ 15,391	\$ 22,897	\$ 36,277
26	<u>Working Capital</u>							
27	12.5% of Operating Expense less							
	Purchased Power	-	-	\$ 946,492	-	-	-	-
28	Prepayments	-	-	71,128	-	-	-	-
29	Materials and Supplies	-	-	1,618,482	-	-	-	-
30		-	-	\$ 2,636,102	-	-	-	-
31	Income Tax Credit (50%)	-	-	\$ ( 4,015,600)	-	-	-	-
32	Total Working Capital	-	-	\$ -0-	-	-	-	-
33	<u>Total Rate Base</u>	-	-	<u>\$118,645,313</u>	<u>\$ 8,471,374</u>	<u>\$48,662,962</u>	<u>\$24,393,302</u>	<u>\$37,117,675</u> 124

THE  
MONTANA POWER COMPANYRate Base by Functions  
1963

Line No.	Description (1)	Balance 12/31/62 (2)	Balance 12/31/63 (3)	Average (4)	Steam Production (5)	Hydraulic Production (6)	Transmission (7)	Distribution (8)
1	<u>Electric Plant in Service</u>							
2	Intangible Plant	\$ 69,047	\$ 69,047	\$ 69,047	\$ 1,240	\$ 53,529	\$ 6,170	\$ 8,108
3	Steam Production	5,986,243	6,007,117	5,996,680	5,996,680	-	-	-
4	Hydraulic Production	61,773,114	61,941,307	61,857,211	-	61,857,211	-	-
5	Total Production	-	-	\$ 67,853,891	\$ 5,996,680	\$ 61,857,211	\$ -	\$ -
6	Transmission Plant	\$30,784,922	\$32,410,867	\$ 31,597,895	\$ -	\$ -	\$31,597,895	\$ -
7	Distribution Plant	51,424,454	54,281,216	52,852,835	-	-	-	52,852,835
8	General Plant	7,982,152	8,891,655	8,436,904	522,891	3,345,948	1,709,177	2,858,888
9	Other Tangible Property	3,622,864	3,717,340	3,670,102	3,670,102	-	-	-
10	Total Electric Plant in Service	-	-	\$164,480,674	\$10,190,913	\$65,256,688	\$33,313,242	\$55,719,831
11	<u>Accumulated Depreciation and Amortization</u>							
12	Steam Production	\$ 1,439,392	\$ 1,574,889	\$ 1,507,140	\$ 1,507,140	\$ -	\$ -	\$ -
13	Hydraulic Production	12,498,005	13,010,263	12,754,134	-	12,754,134	-	-
14	Transmission	5,784,859	6,452,475	6,118,667	-	-	6,118,667	-
15	Distribution	9,515,021	10,203,533	9,859,277	-	-	-	9,859,277
16	General	3,165,064	3,400,828	3,282,946	203,466	1,301,967	665,070	1,112,443
17	Total			\$ 33,522,164	\$ 1,710,606	\$14,056,101	\$ 6,783,737	\$10,971,720
18	<u>Net Plant</u>			\$130,958,510	\$ 8,480,307	\$51,200,587	\$26,529,505	\$44,748,111
19	<u>Customers Advances for Construction</u>	\$ 837,119	\$ 801,197	\$ 819,158	\$ -	\$ -	\$ -	\$ 819,158
20	<u>Contributions in Aid of Construction</u>	\$ 3,519,855	\$ 3,600,394	\$ 3,560,124	\$ -	\$ -	\$ -	\$ 3,560,124
21	<u>Accumulated Deferred Income Taxes</u>							
22	Accelerated Amortization	\$ 2,662,546	\$ 2,983,579	\$ 2,823,062	\$ -	\$ 2,823,062	\$ -	\$ -
23	Liberalized Depreciation	2,653,346	3,098,853	2,876,100	16,106	539,844	889,865	1,430,285
24	Total Accumulated Deferred Income Taxes	-	-	\$ 5,699,162	\$ 16,106	\$ 3,362,906	\$ 889,865	\$ 1,430,285
25	<u>Accumulated Deferred Investment Tax Credit</u>	\$ 150,000	\$ 306,998	\$ 228,499	\$ 1,279	\$ 42,889	\$ 70,698	\$ 113,633
26	<u>Working Capital</u>							
27	12.5% of Operating Expense less							
	Purchased Power	-	-	\$ 1,032,548	\$ -	\$ -	\$ -	\$ -
28	Prepayments	-	-	51,104	-	-	-	-
29	Materials and Supplies	-	-	1,796,754	-	-	-	-
30	Total	-	-	\$ 2,880,406	-	-	-	-
31	Income Tax Credit (50%)	-	-	\$ ( 4,007,921)	-	-	-	-
32	Total Working Capital	-	-	\$ -0-	-	-	-	-
33	<u>Total Rate Base</u>	-	-	\$120,651,567	\$ 8,462,922	\$47,794,792	\$25,568,942	\$38,824,911

THE  
MONTANA POWER COMPANY

SCHEDULE NO. 5  
Sheet 7 of 7

Rate Base by Functions  
1964

Line No.	Description (1)	Balance 12/31/63 (2)	Balance 12/31/64 (3)	Average (4)	Steam Production (5)	Hydraulic Production (6)	Transmission (7)	Distribution (8)
1	<u>Electric Plant in Service</u>							
2	Intangible Plant	\$ 69,047	\$ 69,047	\$ 69,047	\$ 1,240	\$ 53,529	\$ 6,170	\$ 8,108
3	Steam Production	\$ 6,007,117	\$ 6,004,509	\$ 6,005,813	\$ 6,005,813	\$ -	\$ -	\$ -
4	Hydraulic Production	61,941,307	61,830,187	61,885,747	-	61,885,747	-	-
5	Total Production Plant	-	-	\$67,891,560	\$ 6,005,813	\$61,885,747	\$ -	\$ -
6	Transmission Plant	\$32,410,867	\$33,144,121	\$32,777,494	\$ -	\$ -	\$32,777,494	\$ -
7	Distribution Plant	54,281,216	57,030,517	55,655,866	-	-	-	55,655,866
8	General Plant	8,891,655	9,410,128	9,150,892	515,780	3,555,039	1,882,910	3,197,163
9	Other Tangible Property	3,717,340	2,228,327	2,972,834	2,972,834	-	-	-
10	Total Electric Plant in Service	-	-	\$168,517,693	\$ 9,495,667	\$65,494,315	\$34,666,574	\$58,861,137
11	<u>Accumulated Depreciation &amp; Amortization</u>							
12	Steam Production	\$ 1,574,889	\$ 1,712,041	\$ 1,643,465	\$ 1,643,465	\$ -	\$ -	\$ -
13	Hydraulic Production	13,010,263	13,616,606	13,313,434	-	13,313,434	-	-
14	Transmission	6,452,475	6,809,152	6,630,813	-	-	6,630,813	-
15	Distribution	10,203,533	11,137,239	10,670,386	-	-	-	10,670,386
16	General	3,400,828	3,701,324	3,551,076	200,153	1,379,561	730,678	1,240,684
17	Total	-	-	\$ 35,809,174	\$ 1,843,618	\$14,692,995	\$ 7,361,491	\$11,911,070
18	<u>Net Plant</u>			\$132,708,519	\$ 7,652,049	\$50,801,320	\$27,305,083	\$46,950,067
19	<u>Customers Advances for Construction</u>	\$ 901,197	\$ 765,255	\$ 783,226	\$ -	\$ -	\$ -	\$ 783,226
20	<u>Contributions in Aid of Construction</u>	\$ 3,600,394	\$ 3,755,834	\$ 3,678,114	\$ -	\$ -	\$ -	\$ 3,678,114
21	<u>Accumulated Deferred Income Taxes</u>							
22	Accelerated Amortization	\$ 2,983,579	\$ 2,907,079	\$ 2,945,329	\$ -	\$ 2,945,329	\$ -	\$ -
23	Liberalized Depreciation	3,098,853	3,098,853	3,098,853	16,424	542,609	939,882	1,599,938
24	Total Accumulated Def. Income Taxes	-	-	\$ 6,044,182	\$ 16,424	\$ 3,487,938	\$ 939,882	\$ 1,599,938
25	<u>Accumulated Def. Investment Tax Credit</u>	\$ 306,998	\$ 429,052	\$ 368,025	\$ 1,951	\$ 64,441	\$ 111,622	\$ 190,011
26	<u>Working Capital</u>							
27	12.5% of Operating Expenses Less Purchased Power			\$ 1,023,521	-	-	-	-
28	Prepayments			30,876	-	-	-	-
29	Materials and Supplies			1,610,257	-	-	-	-
30	Total			\$ 2,664,654	-	-	-	-
31	Income Tax Credit (48.25%)			( 4,148,069)	-	-	-	-
32	Total Working Capital			\$ -0-	-	-	-	-
33	<u>Total Rate Base</u>			<u>\$121,834,972</u>	<u>\$7,633,674</u>	<u>\$47,248,941</u>	<u>\$26,253,579</u>	<u>\$40,698,778</u>



THE  
MONTANA POWER COMPANY  
ELECTRIC UTILITY DEPARTMENT

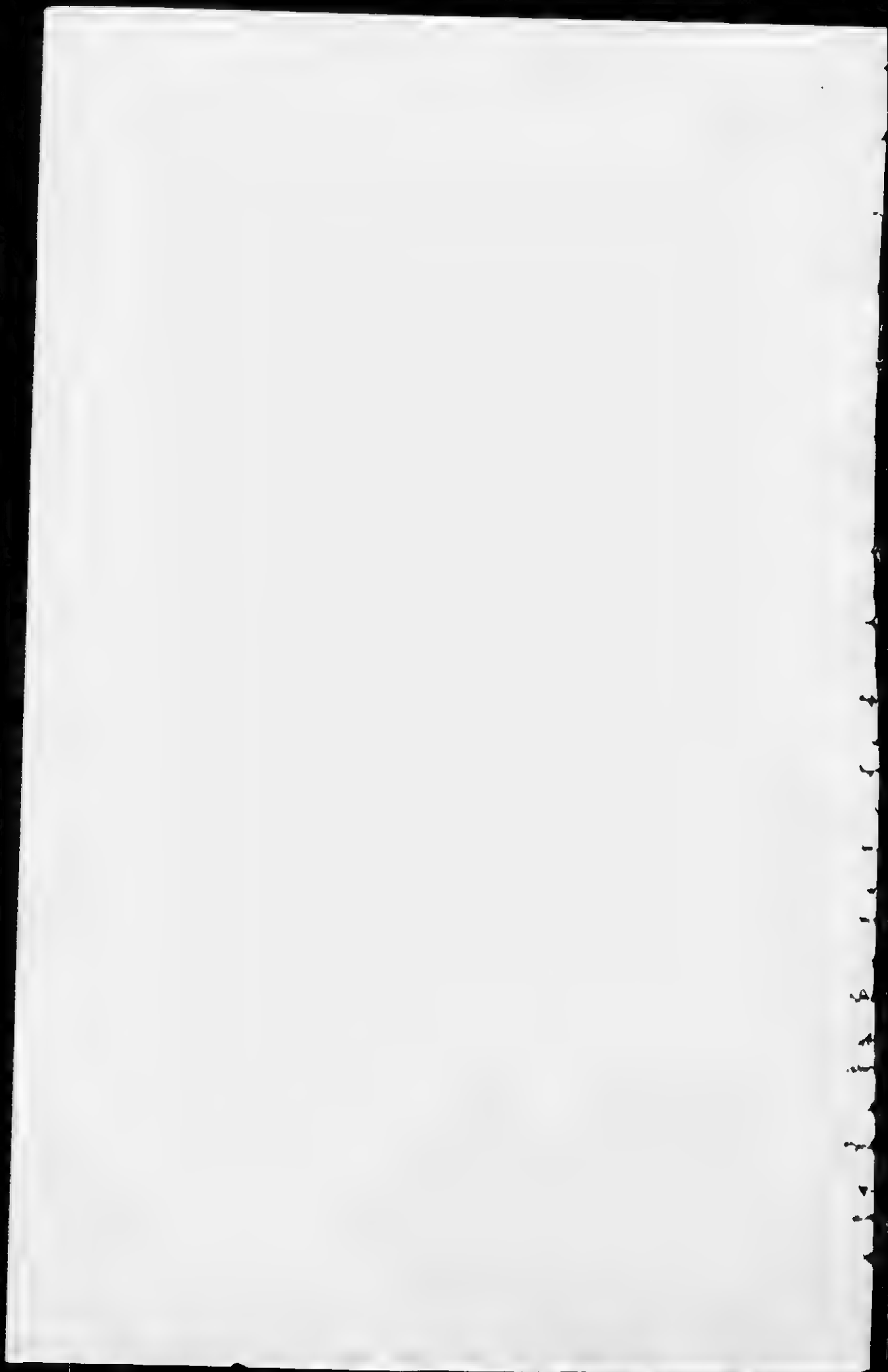
Rate of Return Earned on  
Net Investment Rate Base

Period (1)	Average Net Investment					Working Capital Allowance (7)	Accumulated Deferred Investment Tax Credit (8)	Accumulated Deferred Income Taxes (9)	Rate Base Amounts (10)	Operating Income (11)	Earned Rate of Return-% (12)
	Electric Plant In Service (2)	Accumulated Provision for Depreciation (3)	Contributions in Aid of Construction (4)	Customers Advances For Construction (5)	Total (6)						
1949	\$ 83,253,690	\$16,648,412	\$2,106,852	\$127,289	\$ 64,371,137	\$ -	\$ -	\$ -	\$ 64,371,137	\$ 6,748,146	10.48%
1950	86,813,859	16,424,109	2,237,308	132,733	68,019,709	-	-	-	68,019,709	7,101,941	10.44
1951	92,410,612	17,281,002	2,391,840	145,011	72,592,759	-	-	-	72,592,759	6,660,129	9.17
1952	97,916,007	18,113,076	2,560,032	154,446	77,088,453	-	-	-	77,088,453	7,637,018	9.91
1953	101,306,211	19,078,900	2,698,175	145,122	79,384,014	-	-	-	79,384,014	7,552,638	9.51
1954	109,959,774	20,135,924	2,822,878	134,598	86,866,374	-	-	-	86,866,374	7,583,212	8.73
1955	117,285,668	21,203,084	2,930,132	141,273	93,011,179	-	-	31,719	92,979,460	8,906,882	9.58
1956	120,790,066	22,338,200	3,004,756	163,782	95,283,328	-	-	135,096	95,148,232	9,685,076	10.18
1957	125,635,292	23,600,358	3,058,150	183,936	98,792,848	-	-	324,554	98,468,294	9,689,858	9.84
1958	134,726,362	24,944,240	3,123,629	212,765	106,445,728	-	-	715,054	105,730,674	9,904,865	9.37
1959	145,395,198	26,388,618	3,231,957	277,902	115,496,721	-	-	1,483,341	114,013,380	10,143,713	8.90
1960	151,018,722	27,916,954	3,344,770	311,039	119,445,959	-	-	2,506,535	116,939,424	10,585,875	9.05
1961	154,807,115	29,700,919	3,432,966	565,146	121,108,084	-	-	3,586,102	117,521,982	11,282,356	9.60
1962	159,337,274	31,562,063	3,498,027	829,893	123,447,291	-	75,000	4,726,978	118,643,313	12,115,332	10.21
1963	164,480,674	33,522,164	3,560,124	819,158	126,579,228	-	228,499	5,699,162	120,651,567	12,398,619	10.28
1964	168,517,693	35,809,174	3,678,114	783,226	128,247,179	-	368,025	6,044,182	121,834,972	13,627,509	11.19

THE  
MONTANA POWER COMPANY  
ELECTRIC UTILITY DEPARTMENT

Operating Income

Period (1)	Revenue from Sale of Electricity (2)	Operating Expenses (3)	Depreciation (4)	Taxes Other Than Income (5)	Federal Income Tax (6)	State Income Tax (7)	Provision for Deferred Income Tax (8)	Investment Tax Credit (9)	Miscellaneous Operating Revenue (10)	Total Revenue Deductions (11)	Operating Income (12)
1949	\$18,614,147	\$5,690,363	\$1,037,043	\$2,308,232	\$2,945,606	\$3,044	\$ -	\$ -	\$(118,287)	\$11,866,001	\$ 6,748,146
1950	20,177,126	5,229,638	1,070,262	2,424,684	4,479,300	500	-	-	(129,199)	13,075,185	7,101,941
1951	20,816,870	6,372,501	1,068,933	2,565,532	4,303,768	1,000	-	-	(154,993)	14,156,741	6,660,129
1952	23,116,095	7,085,114	1,233,771	2,290,321	5,052,233	3,699	-	-	(186,061)	15,479,077	7,637,018
1953	23,612,285	7,937,757	1,293,190	2,283,259	4,736,000	-	-	-	(190,559)	16,059,647	7,552,638
1954	23,261,043	7,555,364	1,355,942	2,438,284	4,549,600	-	-	-	(221,359)	15,677,831	7,583,212
1955	26,655,711	7,937,436	1,467,526	2,779,081	5,727,000	-	63,439	-	(225,653)	17,748,829	8,906,882
1956	28,558,768	8,479,504	1,592,772	2,957,311	5,980,000	946	143,314	-	(280,155)	18,873,692	9,685,076
1957	30,254,535	9,221,785	1,669,123	3,087,445	6,645,000	1,682	235,602	-	(295,960)	20,564,677	9,689,858
1958	30,335,129	8,435,142	1,727,485	3,573,841	6,443,300	1,021	545,398	-	(295,923)	20,430,264	9,904,865
1959	31,104,396	8,479,622	1,900,115	3,523,229	6,398,000	161	991,177	-	(331,621)	20,960,683	10,143,713
1960	33,385,624	8,728,231	1,990,459	3,986,155	7,377,300	192	1,055,209	-	(337,797)	22,799,749	10,585,875
1961	34,998,769	8,619,790	2,046,204	4,405,163	7,939,400	524	1,103,927	-	(398,595)	23,716,413	11,282,356
1962	36,970,396	9,105,153	2,136,098	4,677,148	8,031,200	423	1,177,825	150,000	(422,783)	24,855,064	12,115,332
1963	37,583,110	9,719,257	2,223,917	4,783,484	8,015,842	196	766,540	156,998	(481,743)	25,184,491	12,398,619
1964	38,850,646	9,763,153	2,600,115	4,744,237	8,597,035	10	( 76,500)	122,054	(526,967)	25,223,137	13,627,509



1581

SCHEDULE NO. 7

THE  
MONTANA POWER COMPANY

RELATIONSHIP OF KERR HYDROELECTRIC PLANT TO TOTAL  
POWER RESOURCES OF THE MONTANA POWER COMPANY

Line No.	Description	1958	1959	1960	1961	1962	1963	1964
1	Kerr Plant Output Produced:							
2	Percent of Total Net Generation	21.07%	31.45%	30.64%	35.01%	28.45%	25.88%	30.42%
3	Percent of Net Generation and Purchases	17.47	26.28	25.46	28.73	24.56	22.29	26.59
4	Percent of Hydro Net Generation	23.00	31.97	30.64	35.20	31.60	28.43	32.47
5	Kerr Plant Provided:							
6	Percent of Total Net Plant Capability <sup>1</sup>	30.20	30.20	30.05	30.05	30.05	30.56	30.56
7	Percent of Hydro Net Plant Capability <sup>1</sup>	33.96	33.96	33.96	33.96	33.96	34.62	34.62
8	Percent of Net Plant Demand at Time of System Peak	37.40	36.20	36.39	37.23	33.63	35.39	27.26

<sup>1</sup> Under Most Favorable Operating Conditions

(1581)

(1606)

1606

Exhibit No. CT-9 (Revised) Determination of Annual Income  
Reasonably Attributable to Pelton and Round Butte  
Power Sites

Revised  
Project No. 5—Montana  
Confederated Tribes

Exhibit No. 9

Witness: M. W. Van Scoyoc

THE MONTANA POWER COMPANY

DETERMINATION OF ANNUAL INCOME  
REASONABLY ATTRIBUTABLE TO PELTON AND ROUND BUTTE POWER SITES

Line No.	Description		Amount
1	Revenue Applicable to Power Supply	\$22,766,116	\$24,542,432
2	Annual Energy—MWH		6,171,361
3	Average Annual Energy—KW		702,568
4	Maximum System Demand—KW		1,507,000
5	Excess Demand—KW		804,432
6	Demand Revenue	\$12,152,483	\$12,152,483
7	Energy Revenue	\$10,613,633	\$10,613,633
8	Unit Demand Revenue Per KW	\$ 8.0640	\$ 8.0640
9	Unit Energy Revenue Per MWH	\$ 1.7198	\$ 1.7198
10	Pelton Plant		
11	Demand At Time of System Peak—KW		125,000
12	Output—MWH (Average Annual)		400,000
13	Demand Revenue	\$ 1,008,000	\$ 1,008,000
14	Energy Revenue	687,920	1,042,760
15	Total Revenue—Pelton Plant	\$ 1,695,920	\$ 2,572,172
16	Annual Cost		2,725,705
17	Annual Income Attributable to Pelton Power Site	\$(1,029,785)	\$(1,029,785)
18	Round Butte Plant		
19	Demand At Time of System Peak—KW		315,000
20	Output—MWH (Average Annual)		946,000
21	Demand Revenue	\$ 2,540,160	\$ 2,540,160
22	Energy Revenue	1,626,931	2,468,409
23	Total Revenue—Round Butte	\$ 4,167,091	\$ 5,008,569
24	Annual Cost		6,389,269
25	Annual Income Attributable to Round Butte Power Site	\$(2,222,178)	\$(2,222,178)

(1628)

1628

## Exhibit S-7 (Amended)

Storage Payments—Kent to Hungry Horse and  
Payments to Kerr

## KERR PROJECT — INDIAN PAYMENTS

## Payments

Water Year	Kerr To Hungry Horse	Thompson Falls To Hungry Horse	Non-Federal To Kerr	Thompson Falls To Kerr	Federal To Kerr
1959-60 <sup>1</sup>	36,970	700	—	—	—
1960-61 <sup>1</sup>	101,700	4,400	—	—	—
1961-62 <sup>2</sup>	196,000	23,200	121,400	7,000	0
1962-63 <sup>2</sup>	196,000	23,200	121,400	7,000	0
1963-64 <sup>3</sup>	174,500	22,300	156,900	12,600	199,500
1964-65 <sup>3</sup>	174,800	21,000	158,600	12,500	201,600
1965-66 <sup>4</sup>	174,800	29,300	159,500	9,100	201,100
1966-67 <sup>5</sup>	178,900	28,800	160,000	7,600	200,500
1967-68 <sup>5</sup>	156,700	25,200	216,700	6,600	174,500
1968-69 <sup>5</sup>	150,800	24,300	210,900	6,400	189,500

<sup>1</sup> Headwater Benefits Investigation by FPC January 1, 1957 to August 31, 1961, dated March 1965. Tentative determination under appeal.

<sup>2</sup> Based on Pacific Northwest Coordination Agreement 1961-62. Division of Kerr and Thompson Falls payments to Hungry Horse and Thompson Falls to Kerr based on mw-mo data in FPC Staff Report on Docket E-6384—July 1962, and FPC Order of February 6, 1963, in Docket E-6384.

<sup>3</sup> Coordination contracts for 1963-64 and 1964-65.

<sup>4</sup> Computations for 1965-66 coordination contract. Tentative data. Not implemented.

<sup>5</sup> Mw-mo data provided from West Group Forecast Regulations. Cost data assumed the same as 1964-65.

BPA—Branch of Power Resources  
October 21, 1965

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## Exhibit No. MPCo.-34

MPCo. Exhibit No. 34

Modification of Van Scoyoc Approach for Kerr Project,  
(Adopting Unchanged Data on Lines 1-14 and 30  
of Van Scoyoc Schedule No. 37.)

FPO Docket No.  
Project No. 5  
Witness

MODIFICATION OF VAN SCOYOC APPROACH FOR KERR PROJECT  
(Adopting Unchanged Data on Lines 1-14 and 30 of Van Scoyoc Schedule #3)

Line	Description	1958	1959	1960	1961	1962	1963	1964
1.	Cost of Service							
2.	Operating Expenses							
3.	Operations	\$ 76,521	\$ 79,312	\$ 86,256	\$ 83,731	\$ 71,109	\$ 74,080	\$ 75,283
4.	Maintenance	17,970	32,537	22,110	16,104	19,734	21,368	25,149
5.	Miscellaneous							
6.	Total	\$ 94,491	\$ 111,849	\$ 108,366	\$ 99,835	\$ 90,843	\$ 95,448	\$ 100,432
7.	Administrative & General	49,507	55,567	51,799	57,436	51,693	56,476	52,972
8.	Total	\$ 144,098	\$ 167,416	\$ 160,165	\$ 157,271	\$ 142,536	\$ 151,924	\$ 153,404
9.	Depreciation	\$ 146,352	\$ 146,324	\$ 146,353	\$ 146,359	\$ 146,372	\$ 146,374	\$ 172,377
10.	Taxes Other Than Income	418,531	391,319	409,535	465,895	483,975	510,873	467,606
11.	Income Taxes	362,112	364,848	430,279	407,693	391,209	340,907	306,521
12.	Miscellaneous Revenue	(1,205)	(1,156)	(1,078)	(1,030)	(780)	(610)	(640)
13.	Return on Avg. Net Investment	857,071	848,090	840,389	833,557	826,382	818,308	808,763
14.	Total Cost of Serr. 6%	\$ 1,926,959	\$ 1,916,841	\$ 1,985,643	\$ 2,009,745	\$ 1,989,694	\$ 1,967,776	\$ 1,908,031
30.	Average Net Investment	\$14,284,519	\$14,134,832	\$14,006,477	\$13,892,616	\$13,773,032	\$13,638,475	\$13,479,392
A	Earned Rate of Return	9.37%	8.90%	9.05%	9.60%	10.21%	10.28%	11.19%
B	Excess Return Over 6%	3.37%	2.90%	3.05%	3.60%	4.21%	4.28%	5.19%
C	Additional Return in \$	481,388	409,910	427,198	500,134	579,845	583,727	699,580
D	Associated Inc. Tax Factor	108.33	108.33	108.33	108.33	108.33	108.33	100
E	Additional Inc. Tax in \$	521,487	444,056	462,784	541,795	628,163	632,351	699,580
F	Revenue Payments at Kerr	\$ 2,929,834	\$ 2,770,807	\$ 2,875,625	\$ 3,050,674	\$ 3,197,702	\$ 3,183,854	\$ 3,307,191
G	Revenue in Excess of 6%	\$ 1,002,875	\$ 853,966	\$ 889,982	\$ 1,041,929	\$ 1,208,008	\$ 1,216,078	\$ 1,399,160
H	24% of Revenue Above A	\$ 250,719	\$ 213,492	\$ 223,496	\$ 260,482	\$ 302,002	\$ 304,080	\$ 349,790

(8229)

8227

Item H

71st Congress, 2d Session

SENATE

Document No. 153

FLATHEAD  
POWER DEVELOPMENT

MEMORANDUM  
ON THE DEVELOPMENT OF  
FLATHEAD RIVER POWER SITES, MONTANA

8229

1

Flathead Power Development

DECEMBER 30, 1929.

HON. RAY LYMAN WILBUR,

*Secretary of the Interior.*

HON. FEDERAL POWER COMMISSION.

GENTLEMEN: You have before you for consideration applications for the development of Flathead River power sites, Montana, from (1) Rocky Mountain Power Co., of Montana, application No. 5; (2) Walter H. Wheeler, of Minneapolis, Minn., application No. 868.

Hearings upon these applications were held before the full commission beginning October 28, 1929, and lasting 11 days. The record covers 2,295 pages.



SPECIAL LEGAL PROVISIONS RELATING TO FLATHEAD

Under the act of March 7, 1928 (45 Stat. 212-213), provision is made—

That the Federal Power Commission is authorized in accordance with the Federal water power act, and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use, for the development of power or power sites on the Flathead Reservation and of water rights reserved or appropriated for the irrigation projects.

And it is—

*Provided further*, That the rentals from such licenses for the use of Indian lands shall be paid to the Indians of said reservation as a tribe, which money shall be deposited in the Treasury of the United States to the credit of said Indians and to draw interest at the rate of 4 per cent.

It has also been enacted in the act of March 4, 1929, that—

The Federal Power Commission in issuing any permits or licenses for the development of power or power sites on the Flathead Indian Reservation in the State of Montana, as authorized by the act of March 7, 1928, is hereby authorized and directed to waive payment of the usual administrative fees or commissions charged under existing laws relating to or under regulations of said Federal Power Commission in the issuance of any such permits or licenses.

Thus in the case of the Flathead River power development on the Flathead Indian Reservation, Congress has made two unique provisions in addition to the general application of the Federal water power act. These are (1) that the permits or licenses shall be "upon terms satisfactory to the Secretary of the Interior," and (2) that the usual fees charged by the Federal Power Commission for administration and for use of lands shall be waived in favor of the Indians.

(8230)

GENERAL PROVISION AS TO POWER SITES ON  
INDIAN RESERVATIONS

Under regulation 14, section 3, of the regulations of the Federal Power Commission, it is provided that—

When licenses are issued involving the use of tribal lands embraced within Indian reservations, the commission will fix a reasonable annual charge for the

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use thereof, based upon the commercial value of the land for the most profitable purpose for which suitable, including power development. The charge shall commence upon date license is issued.

In order, therefore, to fix the proper rental basis for the use of Indian lands, it is necessary to determine the value of the power sites from their earning standpoint for power purposes. This involves a careful study of (1) the two applicants' proposals; (2) the actual earning power of the Montana Power Co. system, guarantor of one of the applicants; and (3) suggested modifications of the two applicants' proposals.

GENERAL DESCRIPTION OF THE FLATHEAD  
POWER DEVELOPMENT

The Flathead River power sites, five in number, and all within the Flathead Reservation, are among the most important undeveloped power sites of the United States. This is because of (1) the existence of Flathead Lake, a very large natural reservoir which can be very easily enlarged in capacity, and which will serve as storage for all five power sites; (2) the relatively low cost of development; (3) the possible development of Hungry Horse Reservoir upon the head waters of South Flathead River above Flathead Lake, and which would increase the potential capacity

(8230)

of all five sites by 50 per cent; (4) the additional power to be created at the existing Thompson Falls plant of the Montana Power Co. down the Flathead River below the five power sites by the immediate increased storage to be created by the raising of Flathead Lake and the eventual increase of this by the potential development of Hungry Horse Reservoir. Thus these Flathead sites form the key to a very large and cheap development.

Flathead Lake, southwest of Glacier National Park in northwestern Montana, lies on the western side of the Rocky Mountain watershed and is 120,000 acres in area. The south half of the lake is in the Indian reservation. By the building of a dam in the Flathead River Canyon about 4 miles below the present lake outlet, a head of 185 feet at site No. 1 can be developed, and the lake level can thus be raised about 10 feet so as to develop about 1,200,000 acre-feet. By dredging 3 feet from the present lake outlet the draw-down of the lake can be further increased so as to provide almost 1,600,000 acre-feet. Both applicants propose to build such a dam; one proposes also to do as much dredging as will create 1,400,000 acre-feet, giving 6,000 cubic feet per second. As will be shown later, one applicant estimates an average annual output of 68,000 horsepower, the other 105,000 horsepower, both of prime power. The immediate proposals concern site No. 1, but the ultimate development of the other four sites should together involve about as much additional power as site No. 1, the head for each site being as follows:

Site No. 2, 51 feet, located 5 miles below site No. 1.

Site No. 3, 26 feet, located 12 miles below site No. 1.

Site No. 4, 88 feet, located 39 miles below site No. 1.

Site No. 5, 17 feet, located 43 miles below site No. 1.

This would be based on Flathead storage alone and would be increased 50 per cent with Hungry Horse in addition.

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## 8234

## FLATHEAD IS FIRST IMPORTANT POWER SITE ON INDIAN LANDS

The Flathead power development is the first important one upon an Indian reservation wherein power is the controlling factor. In the Coolidge Dam in Arizona power has, of course, been developed, but there it was only as an incidental factor in connection with a great irrigation and reclamation project. This Flathead case is therefore of great importance to the Indians in establishing principles. It has attracted wide attention, and at the hearings two United States Senators and two Congressmen addressed the commission. The Federal Power Commission itself is newly constituted and it has a new executive secretary and new general counsel. Accordingly it would seem unusually appropriate that special care be taken to develop the factors for regulation under the Federal water power act and upon terms satisfactory to the Secretary of the Interior, and for the preparation of a model lease.

In an ordinary power site lease under the Federal water power act there would be only two parties having an interest in the financial results of operating, viz, the successful licensee and the general consuming public. In such a case the power site is either purchased outright by the licensee, and its cost made a part of the developmental cost of the project, or if on Government lands other than Indian, the title to the site remains vested in the United States Government, and the site is leased for 50 years for the nominal fees charged by the Government by way of rental. In this latter case the licensee is saved the necessity of using any capital in the securing of the site.

In the case of a power development upon Indian lands, the title to the site also remains vested in the United States Government but in trust for the Indian tribe, and the site is rented for the 50-year period of the lease to the licensee.

(8234)

Thus the licensee is here also saved the necessity of using any capital in the acquiring of the site, and in lieu thereof pays an annual rental to the Government for the benefit of the Indians. Thus in an ordinary Indian case there are three interests to be adjusted, viz, the successful licensee, the United States for the Indian tribe, and the general consuming public.

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9 SUGGESTED METHOD FOR FIXING RATE OF INDIAN  
RENTALS WHICH ARE FIRST SET UP FOR 20  
YEARS WITH REVISIONS THEREAFTER  
EVERY 10 YEARS

Under section 6 of regulation 14 of the Federal Power Commission it is provided that Indian rentals "may be readjusted at the end of 20 years after the beginning of operation and at periods of not less than 10 years thereafter in a manner to be prescribed in each license." This regulation thus calls for a prescription for calculating the Indian rental. The Indian Bureau accordingly submits in this memorandum a suggested pro forma method of making this calculation to be used (1) in fixing the original rental for the first 20-year period; (2) for later readjustments; (3) for each additional Flathead site as and when developed.

The suggested method consists of determining (1) the estimated and later the actual average annual generating cost, including return but excluding rental per horsepower year; (2) the fixing by the Federal Power Commission of a fair wholesale bus bar price for the current generated at each Flathead site. In the case of Wheeler application, the applicant himself has proposed the single price of \$15, which it would seem in justice to the value of the site and the interests of the Indian could not be made lower. In

the case of the application of the Rocky Mountain Power Co., the commission would have to determine in the light of all the circumstances what would be a fair wholesale intercompany price at the bus bar of each site of electricity generated and sold by Rocky Mountain Power Co. to its parent company, Montana Power Co. (3) The difference between the annual average generating cost so found and the intercompany price so determined represents the economic rental value of the site, and should be divided between the Indians and the general public in proportion to their respective interests. This pro forma method of calculation would thus fix the rate of rental for the period of the lease in question. The amount of rental based upon this rate will then be calculated and paid to the United States for the account of the Indian tribe under accounting supervision of the Federal Power Commission, said amounts to be found by using this rate upon the monthly measured kilowatt-hours generated at each plant. We suggest that payments of rentals should be made preferably monthly, but certainly at least quarterly.

#### PRO FORMA METHOD OF FINDING ANNUAL GENERATING COST

To determine item (1) above of fair annual average generating costs, the method suggested is set out in the accompanying comparative table marked "Flathead Power Applications—Analysis of Power Features for Site No. 1." (See table following p. 48.) In this table are set out in parallel columns: (1) The estimates of the two applicants; (2) the actual showing for the year 1926 of the Montana Power Co., as taken from its report to Federal Power Commission; (3) Indian

(8238)

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Bureau adaptations, as explained below, of the two applicants' set-ups. In each column are stated the following factors which are involved:

I. The factors affecting power capacity:

- (1) Water flow and storage.
- (2) Lake levels.
- (3) Head.
- (4) Efficiency factor.
- (5) Utilization factor.
- (6) Result in power capacity.
- (7) Installation.

II. Development costs:

- (1) Direct expenses.
- (2) Overhead expenses.
- (3) Interest during construction.
- (4) Financing cost.
- (5) Development cost.
- (6) Newell Tunnel.
- (7) Dredging
- (8) Development cost per horsepower.

III. Annual generating costs:

- (1) Operating expenses.
- (2) Overhead expenses.
- (3) Repairs.
- (4) Taxes, insurance, etc.
- (5) Depreciation and obsolescence.
- (6) Amortization.
- (7) Return and excess earnings.
- (8) Annual generating costs per horsepower-year, including 8 per cent return at Flathead.

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## MONTANA POWER CO. SYSTEM

We now turn to the analysis of these Montana Power Co. costs, with a view to their guidance in helping to determine the proper basis of Indian rental.

*Montana Power Co. system, year 1926.*—The year 1926 is used for analysis. The reason is as follows: Toward the close of the hearings it was remembered that in March, 1928, responding to call from Mr. W. V. King, Chief accountant, the commission had received from the Montana Power Co. copies of the latter's reports to the Montana Public Service Commission for 1923, 1924, 1925, 1926, and 1927. The 1927 report was in somewhat different form than the others. Mr. King had them made from these reports a careful study of the costs for 1924, 1925, and 1926 of generating, transmission, and distribution per kilowatt-hour generated and kilowatt-hour sold. He had not determined these costs for 1927. In this study elimination had been made of all nonelectric or nonutility revenues and costs. The Indian Bureau exhibits presented at the hearings used these 1926 calculations, as there was not time to develop the figures for 1927, and 1928 data were not available. The year 1926 was therefore not "selected because it was a good year," as suggested in the Rocky Mountain Co.'s brief. (See also hearings, pp. 2279, 2280.) In fact, the year 1928 would probably make an even better showing. Then the company had 103 per cent utilization factor as against 96 per cent in 1926; its gross revenues from operation (see Wheeler Exhibit I) were \$10,489,777 as against \$8,635,755 in 1926; and its net return from operation was \$6,877,138 as against \$5,439,034 in 1926.

The figures relating to the Montana Power Co. follow:

Installation: 1928-29—327,750 horsepower; 245,000 kilowatts (see Wheeler Exhibit 17 and Major Butler's report); 1930 will be 387,750 horsepower, 290,000 kilowatts.

(8249)

Average output capacity of prime power: 1928-29—233,700 horsepower, 175,300 kilowatts; 1926—217,467 horsepower, 163,100 kilowatts (see Major Butler's report); 1930 will be 268,400 horsepower, 201,300 kilowatts.

Kilowatt-hours generated: 1926—1,375,308,770 kilowatt-hours (company report); 1927—1,362,157,457 kilowatt-hours (company report); 1928—1,584,078,104 kilowatt-hours (hearings, p. 1445).

Kilowatt-hours sold: 1926—1,165,227,847 (Indian Exhibit 3), average price realized 7.41122 mills; 1927—1,171,162,327 (company report), average price realized 7.55506 mills; 1928—1,500,000,000 approximate (hearings p. 1477), average price realized 7.20 mills.

Maximum demand factor: Maximum load for 15 minutes, 1926, 83 per cent; maximum capacity of system, 1927, 78 per cent. (Company reports.)

#### 8250

Load factor: Total kilowatt-hours generated in year 1926, 83 per cent; maximum load in kilowatts for 15 minutes by 8,760 kilowatt-hours, 1927, 81.4 per cent. (Company reports.)

"Plant values" (see Indian Exhibit 3 taken from company's statement to Federal Power Commission).

<i>Plant values</i>			
	1926	Per cent	1927
Generating plants .....	\$27,626,333.37	60.4	\$28,574,074.21
Transmission and transportation	6,934,635.05	15.2	7,014,046.96
Other electric .....	5,702,214.65	12.5	5,964,403.26
Nonelectric .....	5,483,415.29	11.9	5,599,514.77
	45,746,598.36	100.0	46,952,039.20
Water rights, contracts, franchises, etc. ....	51,491,269.56	—	51,699,423.37
Total .....	\$97,237,867.92	—	\$98,651,462.57

These figures were built up by Mr. Hogenah, of Chicago, appraisal engineer, December 31, 1922, and book-cost additions have been added thereafter, as an "appraisal of physical property *determined* (italic supplied) as of December 31, 1913, plus additions to property from December 31, 1913, to December 31, 1922." Does this language mean that the *appraisal* was determined December 31, 1913, or that the *property* was determined historically as of December 31, 1913, plus additions to December 31, 1922, and then the property so determined was appraised as of December 31, 1922? Mr. Kelly, the company's attorney, took the former view very positively, but from the testimony of Mr. Cochrane, the company's chief engineer, it is clear that he considered the appraisal values as applying to December 31, 1922. Mr. Hogenah had been employed in 1913 and again in 1922 to make depreciation studies, and it would appear that he made a fresh start on the valuations as of December 31, 1922. But how interpret the above language? In order to throw as much light as possible on this moot point, we submit the discussion which took place on the last day of the hearings (pp. 2247-2250):

Mr. Scattergood. Now, just for the purpose of explanation to the commission, that first set of figures, namely, tangibles, were calculated on the basis, were they not, of an engineer's report by Mr. Hogenah? That was made as of December 31, 1922, and thereafter book values of actual additions to property were added from year to year. Isn't that the way it was calculated?

Mr. Cochrane. That is my understanding.

Mr. Scattergood. So that as a matter of fact, these first tangible figures represent that engineer's idea—and he was also your own engineer—of the real value of tangible property?

Mr. Cochrane. Yes.

Mr. Scattergood. And the other items—water rights, contracts, franchises, etc.—were what you might call intangibles?

Mr. Cochrane. Yes.

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Mr. Scattergood. In other words, what those whole figures total for 1927, which is fifty-one millions and upward, really represents what is customarily called "water," doesn't it?

Mr. Cochrane. I think somebody suggested that a column might be put for that water. But I don't think as a matter of fact that it is all water.

Mr. Scattergood. I don't suppose it is. I have no doubt that if you were asked to set a value (a "fair value") on it, you would maintain that you had a going-concern value and various other considerations that would have to be included, such as good will, that would be properly includible in the item of these intangibles, would you not?

Mr. Cochrane. Yes.

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Mr. Scattergood. So that that ("fair value"), as I understand, has never been determined—what is a fair value of the property?

Mr. Cochrane. No.

Mr. Scattergood. Now, these represent the average 1922 reconstruction cost values plus actual investments afterwards?

Mr. Cochrane. Yes.

Mr. Scattergood. Now, the prices prevailing about the end of 1922 were not quite the peak of the postwar prices, were they? They were a little under the peak?

Mr. Cochrane. You mean that they had gone down a little by that time?

Mr. Scattergood. Yes.

Mr. Cochrane. I think so.

Mr. Scattergood. But still they were fairly near the peak of 1921, were they not?

Mr. Cochrane. I presume so.

Mr. Scattergood. So that those values that are given as of that date are probably outside of what would be a real reconstruction cost less depreciation to-day?

Mr. Cochrane. Yes.

At this point Mr. Kelly, the company's attorney, called attention to a footnote on the engineer's valuation reading "Represents appraisal of physical property determined as of December 31, 1913, plus additions to property from December 31, 1913, to December 31, 1922." He then said:

Mr. Kelly. So that the original appraisals were made upon a basis of property values as of December, 1913, and not 1922; so that the question is misleading. The exhibit does not show that and it is not a fact.

Mr. Scattergood. Well, of course, in 1913 you did not have all of your plants built.

Mr. Kelly. No. This figure represents the 1913 valuation of such plants as were then built, plus the actual cost of such plants as were built since then, many of which were built before the war prices—the plants that were built between 1913 and 1918.

The status as to plants is as follows (see p. 1472 et seq. and Major Butler's report):

*Montana Power Co.'s plants, 1929*

Plant	Built	Maximum		Average		Capacity Factor
		Kilowatts	Horsepower	Kilowatts	Horsepower	
Black Eagle .....	1927	18,000	24,000	15,200	20,300	0.84
Canyon Ferry .....	—	7,500	10,000	5,600	7,500	.75
Hauser Lake .....	1918	18,000	24,000	14,500	19,300	.80
Holter .....	1918	50,000	67,000	25,500	34,000	.51
Madison .....	—	9,000	12,000	8,500	11,300	.95
Mystic Lake .....	—	11,300	16,750	6,500	8,666	.56
Rainbow .....	{ 1910 }	36,000	48,000	30,500	40,667	.85
Thompson Falls .....	{ 1916 }					
Volta .....	1916	35,000	47,000	22,000	29,300	.63
Volta .....	1916	60,000	80,000	47,000	62,667	.78
Total, 1929 .....	—	245,000	327,750	175,300	233,700	.72
Maroney (now building)	—	45,000	60,000	26,000	34,700	.58
Total, 1930 .....	—	290,000	388,750	201,300	268,400	.69

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From this table it is evident that the larger plants have been built during or since the war. Allowing half of Rainbow to pre-war and half during the war, it is seen that about two-thirds of the capacity dates during or since the war.

Some light is also furnished by Mr. Kerr's and Mr. Cochrane's answers on pages 1153 and 1193-1194 in regard to basis of valuations. Mr. Kerr and Mr. Cochrane had testified, respectively, that in round

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figures the installation cost of the Montana power system and of the Flathead would be about \$100 per horsepower.

Mr. Scattergood. Did you use the same general scheme of valuation?

Mr. Kerr. I would say so; yes.

Mr. Scattergood. Present-day reproduction costs?

Mr. Kerr. Yes.

It was later shown by Mr. Cochrane that in the company's set-up of 68,000 horsepower and \$7,947,500 development cost of Flathead, the installation cost per horsepower would be \$116.87, not \$100, as Mr. Kerr had roughly calculated it. Also it has been shown that the system's installation cost on their own figures of valuation for 1927 was \$121.41 per horsepower. Inasmuch, therefore, as Mr. Kerr said that on a present-day reproduction cost basis the cost would be \$100 horsepower, it is evident that the company's valuation figures of 1927 used above can not be less than reproduction cost figures of present day, as Mr. Kelly's interpretation would seem to indicate.

Whatever the proper interpretation of these figures may be, it can at least be said that they form the company's own statement of values as made to the Federal Power Commission. They are the only valuation figures in the record except the assessed valuation for taxation of all the property (electric and nonelectric) at \$52,000,000 (see p. 1683). There has never been a rate case, nor has any

"fair valuation" ever been placed upon this company either by the Federal Power Commission or the Montana Public Service Commission.

In the use of the word "return" as applied to the Montana Power Co., it will therefore be understood that the return is calculated upon the company's own figures, as above set forth. It is to be noted also that these valuations of the company certainly can not be less than the basis of actual investment provided in the Federal water power act, and they may and probably are much higher than said basis.

*Investment cost.*—Using the above generating plants figures of 1927 and the 1928 capacity figures, we have as the unit cost of development of the whole Montana Power Co.'s system: \$121.41 per horsepower; \$161.88 per kilowatt.

*Actual generating revenue or generating cost including return and excess for year 1926*

	Per cent on com- pany valua- tion	Cost per kilo- watt- hours gener- ated	Amount
<i>Mills</i>			
Operating expenses .....	1.39	0.280	\$ 384,566.82
Overhead expenses (apportioned) ....	.44	.097	132,701.85
All taxes, insurance, etc. (apportioned)	2.81	.564	776,868.06
Depreciation, obsolescence .....	.75	.150	206,045.00
			<hr/>
			\$1,500,181.73
Return at—			
8 per cent .....	13.84	{ 1.607	2,210,106.64 }
5.84 per cent excess .....		{ 1.175	1,615,352.36 }
			<hr/>
Total .....	19.23	3.873	5,325,640.73
<hr/>			
	Per horsepower- year	Per kilowatt- year	Per kilowatt- hour
<i>Mills</i>			
Generating cost, including—			
Return, at 8 per cent .....	\$17.72	\$23.63	2.698
Excess, at 5.84 per cent ....	7.72	10.29	1.175
			<hr/>
Total .....	25.44	33.92	3.873
<hr/>			



## 8253

The basis for the above figures is found in Mr. King's figures as set out in Indian Exhibit 3. He therein included the items general and undistributed expenses, totaling \$466,335.58, entirely in "Distributing and all other costs." As this applies pro rata to generating and transmission costs, it is subdivided and prorated as follows:

Generating .....	60.4 per cent	} \$410,841.65
Transmission .....	15.2 per cent	
Distribution, etc. ....	12.5 per cent	
Nonelectric .....	11.9 per cent	
		55,493.93
Total .....	<sup>1</sup> 100.0 per cent	466,335.58

This \$410,841.65 for electric property is further subdivided in proportion to direct expenses as follows:

		Per ct.	
Generating .....	\$ 384,566.82	32.3	\$132,701.85
Transmission .....	237,869.02	19.9	81,757.49
Distribution, etc. ....	567,801.48	47.8	196,382.31
Total .....	1,190,237.32	100.0	410,841.65

We then have adjusted costs for 1926 as follows:

## Generating:

Operating expenses (direct) .....	\$ 384,566.82
General and undistributed (prorated) ...	132,701.85
Depreciation actually charged (prorated)	206,045.00
All taxes (prorated) .....	776,868.06

Total ..... 1,500,181.73

## Transmission:

Operating expenses (direct) .....	237,869.02
General and undistributed (prorated) ...	81,757.49
Depreciation actually charged (prorated)	65,065.00
All taxes (prorated) .....	194,999.52

Total ..... 579,691.03

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Distribution and other costs (electric operations):	
Distributing, commercial, consumption ...	567,801.48
General and undistributed (prorated) ...	196,382.31
Depreciation actually charged (prorated)	54,845.00
All taxes (prorated) .....	160,382.93
Total .....	979,411.72

To divide return and excess between the three divisions, we proceed:

Income from electric operations, 1926 (from company report) .....		\$8,635,755.33
Expenses as above:		
Generating .....	\$1,500,181.73	
Transmission .....	579,691.03	
Distribution, etc. ....	979,411.72	
		3,059,284.48
Return, 8 per cent .....	3,221,054.64	
Excess, 5.84 per cent .....	2,355,416.21	
		5,576,470.85

This shows that return and excess together are 64.6 per cent of gross revenue.

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<sup>1</sup> In proportion to plant values, as per company statement.

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This return and excess is then distributed in proportion to investments in plant values (electric only) as per company's statement, as follows:

Generating, 68.6 per cent:

8 per cent return .....	\$2, 210, 106. 64	
5.84 per cent excess .....	1, 615, 352. 36	
	<hr/>	\$3, 825, 459. 00

Transmission, 17.2 per cent:

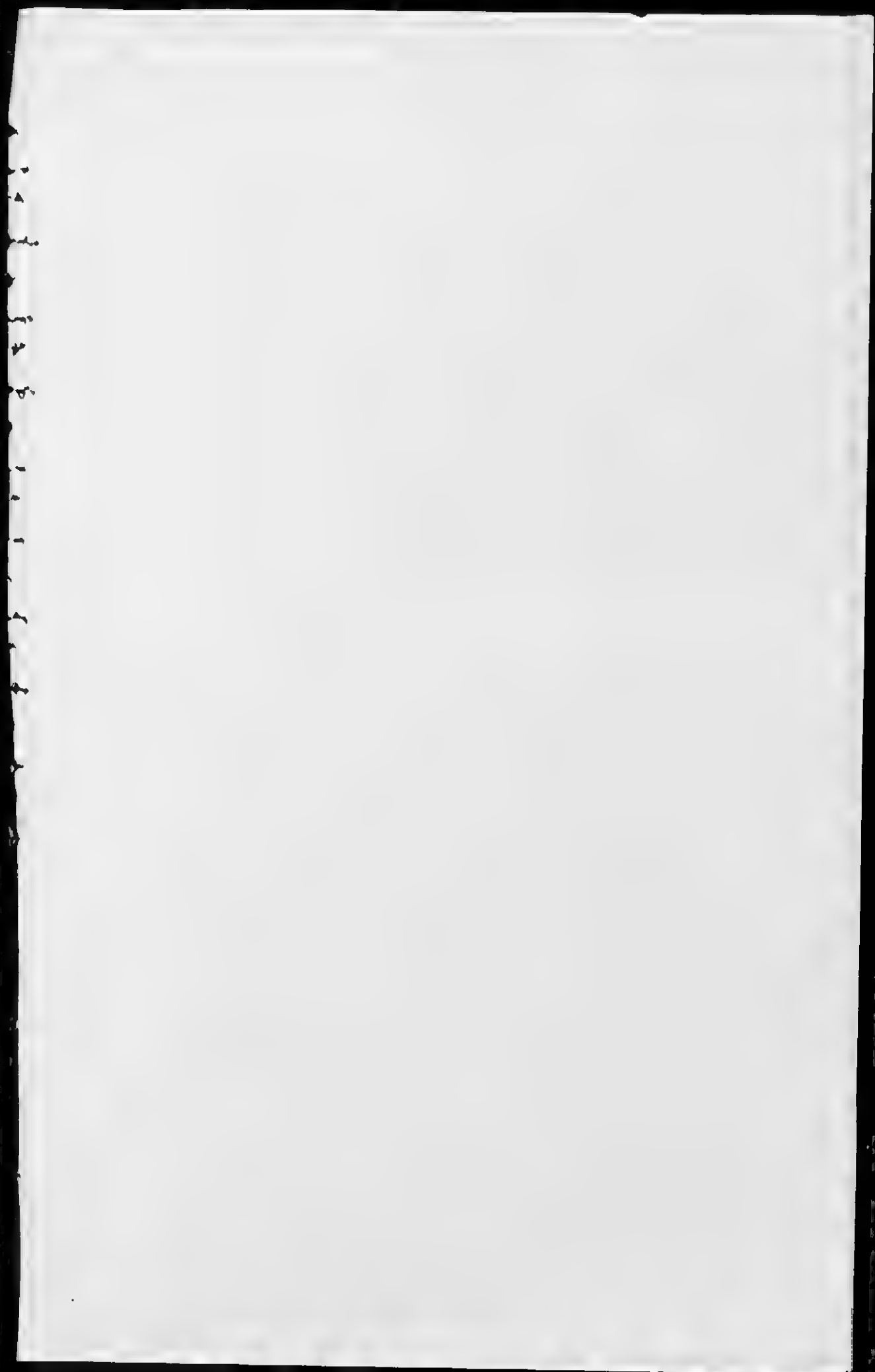
8 per cent return .....	554, 770. 80	
5.84 per cent excess .....	404, 382. 19	
	<hr/>	959, 152. 99

Distribution, 14.2 per cent:

8 per cent return .....	456, 177. 20	
5.84 per cent excess .....	335, 681. 66	
	<hr/>	791, 858. 86

Total ..... 5, 576, 470. 85

Assembling the direct costs and the return and excess distributed, we then finally have:



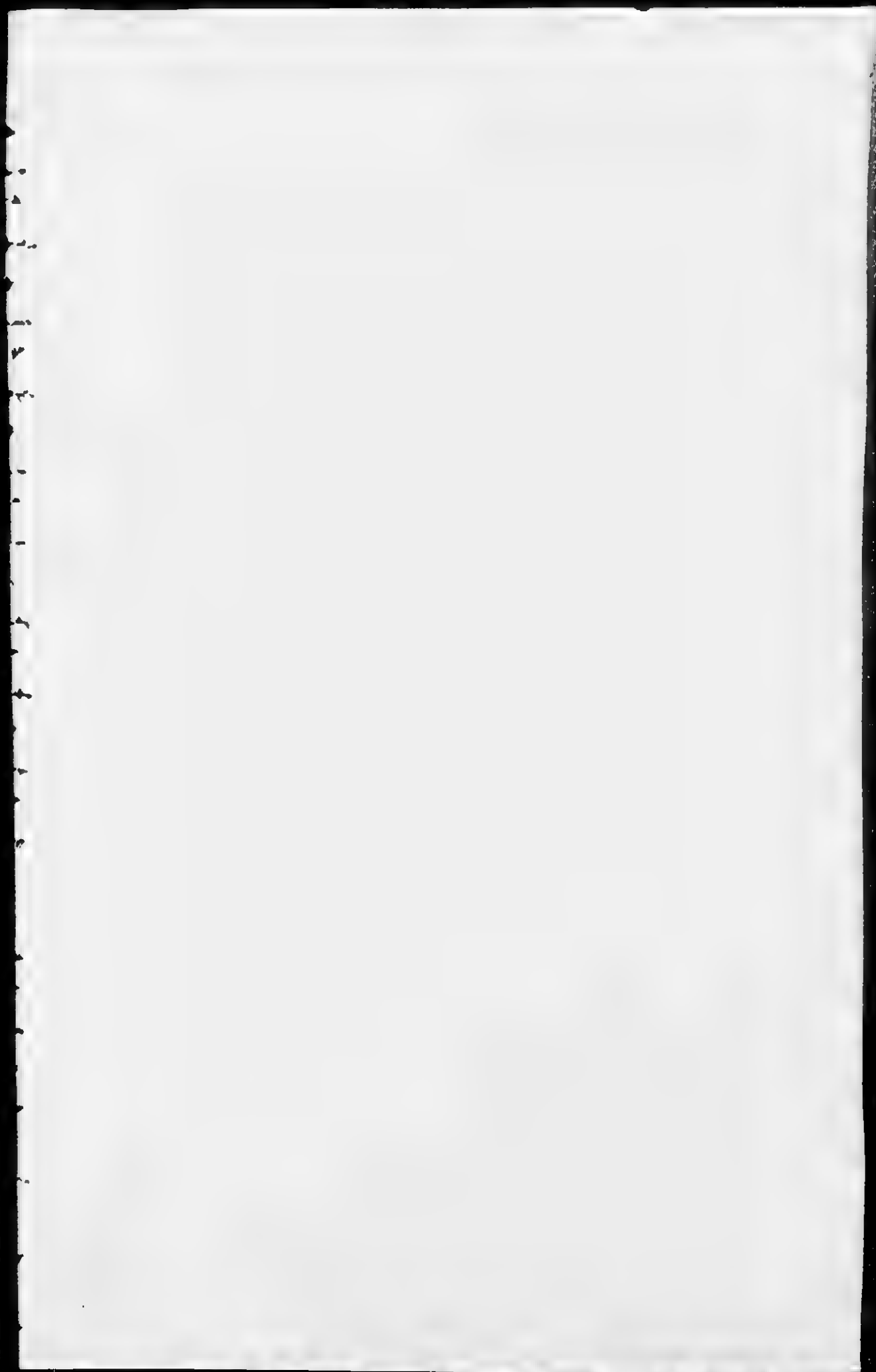
(8255)

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## Cost and profit of Montana Power Co. System, 1926

		Generated			Sold		
		Per kilowatt- hour	Per horsepower	Per kilowatt	Per kilowatt- hour	Per horsepower	Per kilowatt
Generating:		<i>Mills</i>			<i>Mills</i>		
Operating expenses .....	\$ 384,566.82	0.280			0.330		
General expenses .....	132,701.85	.097			.114		
Depreciation actually charged ..	206,045.00	.150			.177		
All taxes .....	776,868.06	.564	\$17.72	\$23.63	.666	\$20.92	\$27.89
Return 8 per cent .....	2,210,106.64	1.091			1.287		
Excess 5.84 per cent .....	1,615,352.36	1.607	7.72	10.29	1.897	9.11	12.15
		1.175			1.387		
	3,825,459.00						
	5,325,640.73	3.873	25.44	33.92	4.571	130.03	40.04
Transmission:							
Operating expenses .....	237,869.02	—	—	—	.204		
General expenses .....	81,757.49	—	—	—	.070		
Depreciation actually charged ..	65,065.00	—	—	—	.056		
All taxes .....	194,999.52	—	—	—	.167	6.39	8.52
Return 8 per cent .....	554,770.80	—	—	—	.497		
Excess 5.84 per cent .....	404,382.19	—	—	—	.476	.28	3.04
					.347		
	959,152.99	—	—	—	1.320	1 8.67	11.56
	1,538,844.02	—	—	—	—		
Distribution, etc.:							
Distributing, etc. ....	567,801.48	—	—	—	.487		
General expenses .....	196,382.31	—	—	—	.169		
Depreciation actually charged ..	54,845.00	—	—	—	.047		
All taxes .....	160,382.93	—	—	—	.138	8.09	10.79
Return 8 per cent .....	456,177.20	—	—	—	.841		
Excess 5.84 per cent .....	335,881.66	—	—	—	.391	1.89	2.52
					.288		
	791,858.86	—	—	—	1.520		13.31
	1,771,270.58	—	—	—	—	1 9.98	
Gross revenue from operations	8,635,755.33	—	—	—	7.411	148.68	64.91

<sup>1</sup> These figures vary from Indian Exhibit No. 6 because of the distribution of general expenses and because of including here \$87,655.42 miscellaneous earnings from operation which had been erroneously omitted.



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From the above table it will be seen that in 1926 the earnings of the company showed per horsepower sold:

	Per horse- power- year	Mills per kilowatt- hour
Cost, including 8 per cent return ....	\$35.40	5.29
Excess of 5.84 per cent .....	13.28	2.02
Gross .....	48.68	7.41

It also shows:

*Actual direct cost on current sold*

	Mills per kilowatt- hour	Per horse- power	Per kilowatt
Generating cost .....	1.287	\$8.45	\$11.27
Transmission cost .....	.497	3.26	4.35
Distribution and other ....	.841	5.53	7.37
Total .....	2.625	17.25	22.99

And—

8 per cent return .....	2.764	18.16	24.21
5.84 per cent excess ....	2.022	13.28	17.71
Total .....	4.786	31.44	41.92
Grand total .....	7.411	48.68	64.91

In other words, \$31.44 out of \$48.68 per horsepower-year is return including excess or 64.6 per cent, i. e. of every dollar in gross revenue, 64.8 cents is return on the company's own valuation basis.

In passing it is of general interest to note:

(1) Here is a public utility hydro power company with a remarkably low average selling price of its power. In



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1926 it was 7.411 mills per kilowatt-hour sold, i.e. \$48.68 per horsepower-year. In 1928 it was 7.2 mills per kilowatt-hour sold, i. e., \$47.36 per horsepower-year. Mr. Kerr, its vice president, probably is well advised in his claim that it has the lowest general average selling price of any power company in the United States. He claims it is half a cent less in average selling price than the much discussed Province of Ontario Government project.

(2) Its prices to its special large load customers are very low indeed. To its largest customer it sells at \$25 per horsepower-year with a sliding scale reducing this price even lower when certain metal prices go down. Also, its general prices to small customers throughout Montana are claimed to be uniform throughout the State, and to compare very favorably with such prices generally charged elsewhere by power companies.

(3) Yet in spite of these prices which compare so favorably with the rates for electricity generally charged throughout the United States, this company has been able to make current so cheaply through the natural advantages of its water-power sites that it actually earned 13.84 per cent in 1926 (taken as a sample year) upon its own valuation of about \$41,350,000 for its tangible property.

(4) These earnings have supported and paid returns upon a securities structure of bonds and stock totalling about twice the value of all of its tangible property. Its own valuation of its intangibles, consisting of "water rights, contracts, franchises, etc.," was about \$51,500,000.

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(5) The valuation upon which this return is calculated is, as stated, the company's own valuation of its tangibles. As already pointed out, it is not entirely clear from the testimony just what the basis of values is. Assuming on the one hand that it represents the appraised value as of

December 31, 1913, plus actual investments made since that date, then the tangibles approximate the basis of valuation provided for in the Federal water power act. If, on the other hand, it represents appraised values of the property December 31, 1922, plus actual investments made since then, it would represent approximately "present-day reproduction-cost values."

The so-called "fair value" fixed as a rate base by a commission in a rate case would probably be somewhere between these two ways of estimating values.

(6) No rate case has ever been brought to test this company's rates and no "fair value" basis of valuation has ever been established. Such reductions in rates as have been made have been made voluntarily by the company itself.

(7) It is apparent from the above figures that further rate reductions averaging \$13.28 per horsepower-year, or 2.02 mills per kilowatt-hour—i.e., about 27 per cent—could be made and still the rates would provide to the company an allowed return of 8 per cent upon its own valuations of its tangible property.

(8) The Flathead site No. 1 reveals \$4.33 lower generating cost per horsepower-year, including 8 per cent return, than the Montana Power Co. system generating cost in 1926, also including an 8 per cent return; and this does not include \$7.22 per horsepower generated excess earnings actually made.

(9) In the face of these figures it is apparent that the \$1 per horsepower-year offered by the company for Indian rental is far from proper compensation based on the value of the site. This will be referred to further.

(10) With regard to regulation, the jurisdiction of the Federal Power Commission and of the Secretary of the

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Interior in this case do not extend beyond the applicants. The Montana Power Co. is subject, as already stated, only to the jurisdiction of the Montana Public Service Commission. It would seem all the more important, therefore, that full powers of regulation be exercised by the Federal Power Commission upon the licensee, whether Rocky Mountain Power Co. or Wheeler.

#### IV. INTERCOMPANY PRICE

In the case of applicant Wheeler, this subject has no bearing because he sets up only one company, and fixes his output price wholesale at \$15 per horsepower. He did quote, however, a price of  $2\frac{1}{2}$  mills, which is \$16.34 per horsepower-year, to H. M. Byllesby & Co.'s Mountain States Power Co. at Kalispell, Mont., and found this price would interest them. Mr. Kerr, when asked, said this was a very favorable price, if there were no maximum demand.

In the case of applicant Rocky Mountain Co., the applicant's set-up in Exhibit 8 was based on \$18 per horsepower-year, which is 2.75 mills per kilowatt-hour wholesale price at bus bar. See also Rocky Mountain brief, page 6, where the explanation is made "Total cost

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(and proposed selling price) per horsepower sold, \$18." Also see pages 1333-1334.

Further references to intercompany prices in the record are also cited as follows:

(1) Mr. Kerr told the story of the pick-up bargain rate of \$10 per horsepower-year, or 1.52 mills per kilowatt-hour prevailing for a time from the Washington Water Power Co. to the Intermountain Power Co., not a criterion for present day conditions (p. 1192); also of a rate prevailing between a Stone & Webster Co. further west of

\$16 per horsepower for 10,000 horsepower, plus three-fourths mill per kilowatt-hour for high-water months and  $2\frac{1}{2}$  mills for low-water months, which figured out is \$21 per horsepower-year, or 3.20 mills per kilowatt-hour.

(2) The price between Washington Water Power Co. and Montana Power Co. now prevailing when power is exchanged is 3 mills per kilowatt-hour (p. 1190). This is, according to Mr. Kerr, "so-called 'dump power' furnished when and as they have it, with nothing to bind them to furnish it." When asked, if it were primary power whether it would be an even higher price, he replied "Oh, yes; no doubt."

(3) Mr. Cochrane stated that if the Wheeler plan of selling only to large consumers were changed, and he developed a plan similar to that of the Rocky Mountain Power Co. and offered a price comparable to it, the Montana Power Co. might do business with him (p. 1402).

(4) Before the consolidation of its subsidiary operating companies with the Montana Power Co., the intercompany price for power exchanged was 5 mills or \$32.84 per horsepower-year (p. 2091).

(5) Finally, as to the suggested price for power between Rocky Mountain Power Co. and Montana Power Co., the record on pages 2290 to 2292 is as follows:

Mr. Scattergood. What would be the right price, do you think, for the Rocky Mountain Power Co., if its entity were continued, to charge to the Montana Power Co.?

Mr. Kerr. I can't say any figure. I can't make an off-hand guess at a figure, because I told you here the other day that I didn't know what the final cost would be; but I can tell you what is a common price, one that is offered by the Government, for instance, at Boulder Dam, 3 mills (or \$19.60 per horsepower); and in make dump power, so-

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called dump-power contracts where we charge  $2\frac{1}{2}$  mills (or \$16.34 per horsepower) and 2 mills (or \$13.07 per horsepower).

Mr. Scattergood. Would you feel that the commission would be well advised if it used that price of 3 mills as a price between the two companies at the bus bar?

Mr. Kerr. If you charge 3 mills to the other company, I say that is all right, if it would give a proper return. It would have to be a proper return. You are asking generally what these kinds of prices are. I have told you.

Mr. Scattergood. That is what I want, because it would go into the whole picture.

Mr. Kerr. And I want to emphasize that the Montana Power Co.'s 5-mill price was simply a convenient figure. It is easy to multiply by 5, and it don't make a bit of difference in the final answer.

Mr. Scattergood. Of course if you did offer the Montana Power Co. wholesale current at Flathead at 3 mills, you (the Montana Power Co.) would have to put on the additional transmission cost and your interest on your transmission machinery, and all your other charges, wouldn't you?

Mr. Kerr. Yes, sir.

Mr. Scattergood. But that would be a fair price that you think could——

Mr. Kerr. That is one of the prices that is around in the neighborhood that might be sold.

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For purposes of easy comparison, the following conversion table is submitted:

Conversion table

Per kilowatt-hour	Horsepower year (at 6535 mills)	Kilowatt year	Per kilowatt-hour	Horsepower year (at 6535 mills)	Kilowatt year
2 mills .....	\$13.07	\$17.52	2.85 mills .....	\$18.62	\$24.97
2.10 mills .....	13.72	18.40	2.90 mills .....	18.95	25.40
2.20 mills .....	14.38	19.27	2.95 mills .....	19.28	25.88
2.25 mills .....	14.70	19.71	3 mills .....	19.60	26.28
2.30 mills .....	15.03	20.15	4 mills .....	26.14	35.04
2.35 mills .....	15.36	20.39	5 mills .....	32.68	43.80
2.40 mills .....	15.69	21.02	6 mills .....	39.21	52.56
2.45 mills .....	16.01	21.46	7 mills .....	45.74	61.32
2.50 mills .....	16.34	21.90	9 mills .....	52.28	70.08
2.55 mills .....	16.66	22.34	9 mills .....	58.81	78.84
2.60 mills .....	16.99	22.78	1 cent .....	65.35	87.60
2.65 mills .....	17.32	23.22	5 cents .....	326.75	438.00
2.70 mills .....	17.64	23.65	8 cents .....	522.80	700.80
2.75 mills .....	17.97	24.09	10 cents .....	653.50	876.00
2.80 mills .....	18.30	24.53			

#### V. THOMPSON FALLS AND ITS SAVINGS TO MONTANA POWER CO. IF FLATHEAD POWER SITE NO. 1 IS DEVELOPED

One further feature remains to be considered. This is the benefit which will automatically accrue to the Thompson Falls plant of the Montana Power Co., located as it is down the Flathead River on Clarks Fork of the Columbia River, and which will be caused by the regulation of flow through the increased storage at Flathead. This increase of power at Thompson Falls will accrue whether the Rocky Mountain Power Co. or Wheeler is the developer of the Flathead site No. 1.

There was considerable reference in the hearings to Thompson Falls. Suffice it here to say that the Montana Power Co. itself admitted an estimated increase of 10,000 horsepower distributed over eight months of the year (pp. 1502, 1625), making about 66,000,000 kilowatt-hours additional (p. 1638). This is based on an increased flow of

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2,600 cubic feet per second due to Flathead storage (p. 1626) and an average head of 50 feet and 70 per cent efficiency (pp. 1640, 1708). Taking the 1926 basis of sale and net return as already calculated, we have 66,000,000 kilowatt-hours by 7.411 mills, equals \$488,400; and 64.8 per cent for return including excess shows \$316,483 additional profit from Thompson Falls. This is on the admitted assumption that no additional transmission lines would have to be built (p. 2065), although if this added load were to be constantly transmitted east, it would be an economy to build an additional line to supplement the Milwaukee Railroad transmission line now used. If this extra Thompson Falls current were sold to the west to Washington Power Co. at 3 mills (p. 207), it would lower the average price used above.

At the hearings the increased amount shown to be available at Thompson Falls because of Flathead storage was conservatively calculated as only 43,000,000 kilowatt-hours additional, showing net gains of \$193,000.

Based on the 1928 generated output of 1,584,000,000 kilowatt-hours this increase of 66,000,000 kilowatt-hours at Thompson Falls is an increase of more than 4.1 per cent for the whole system. Using again



## 8260

the 1926 cost figures and adding the \$316,483 added profit to the system shows the following:

*Generating cost, 1926*

	Mills per kilowatt- hour	Per horsepower	Per kilowatt
Montana Power Co. system: 8 per cent return .....	2.698	\$17.72	\$23.63
5.84 per cent excess .....	1.175	7.72	10.29
Total, 13.84 per cent .....	3.873	25.44	33.92
Montana Power Co. system with Thompson Falls added production because of Flathead storage:			
8 per cent return .....	2.698	17.72	23.63
6.99 per cent excess .....	1.340	8.80	11.73
Total, 14.99 per cent .....	4.038	26.52	35.36

Thus Thompson Fall's increase because of Flathead storage would add \$1.08 per horsepower-year to the Montana Power Co.'s system on the basis of the 1926 figures and would increase the return, including excess, to 14.99 per cent. Presumably this would be available for rate reductions to consumers. (See p. 1542.) It is not claimed here as available for the Indian rental, but, as will shortly be shown, it is an element that must enter into the calculation of the interests of the general public and of the irrigation project in particular.

## VI. INDIAN RENTAL

We are now in position to assemble the elements already considered and to develop what they reveal to be available for (1) the company's return, (2) Indian rental, (3) general consumers, and (4) the special consumers in the irrigation projects. In order that full justice be done to the Indians, it is proposed here to consider the case first as if

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there were only the first three parties and no irrigation project, and thus to fix the proper intercompany price for the pro forma calculation of the Indian rental; then secondly to make such slight modification in said intercompany price as may be necessary to provide under existing conditions the reservation by the United States for the irrigation project of 15,000 horsepower at the prices agreed upon in advance by one of the applicants.

If the license is given to applicant Wheeler, and if the lake regulation permitted 6,000 cubic feet per second of water, as he estimated, there would then be a margin of \$2.33 per horsepower-year between his price to consumers of \$15 and his cost as adjusted to an 8 per cent return and 0.6 per cent amortization charge, of \$12.67. Out of this the Indians and the irrigation project would have to be provided for. If, however, only 5,440 cubic feet per second of water is allowed in the lake regulation, Wheeler's prime power capacity will be reduced to 95,000 horsepower, and his cost will be increased to \$14 per horsepower. There would then be a margin of only \$1 per horsepower-year between his price to consumers of \$15 and this \$14 cost. Manifestly, so far as Indian rental goes, Wheeler's proposition of selling power at \$15 per horsepower can not compare with applicant Rocky Mountain Power Co.'s intercompany price of \$18 in advantage to the Indians. Furthermore, it is to be remembered, as already shown,

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that applicant Wheeler's high cost of financing and overhead and his high operating estimates penalize him about \$1.70 per horsepower-year when compared with the other applicant on the same basis of capacity, and which would otherwise be available at least in part for Indian rental.

If the license is given to Rocky Mountain Power Co., we have the following assembled elements:

*Average annual generating cost*

	Per horse- power year	Per kilowatt- hour (mills)
Rocky Mountain Power Co.'s estimate, at 8 per cent return, excluding rentals .....	\$15.88	2.42
Rocky Mountain Power Co.'s estimate as adjusted, at 8 per cent return, excluding rentals .....	13.39	2.04
Rocky Mountain Power Co.'s estimate, at 8 per cent return, including Indian rentals .....	16.88	2.56
Montana Power Co. system, 1926:		
8 per cent return .....	17.72	2.698
5.84 per cent excess .....	7.72	1.175
Total, 13.84 per cent .....	25.44	3.873
Montana Power Co. system, 1926, with Thompson Falls additional power added:		
8 per cent return .....	17.72	2.698
6.99 per cent excess .....	8.80	1.340
Total, 14.99 per cent .....	26.52	4.038

From the above it is to be seen that—

The adjusted estimated average generating cost for 80,500 horsepower including 8 per cent return at Flathead (\$13.39 per horsepower) is:

(1) \$2.49 per horsepower less than applicant's own estimate of \$15.88 at 8 per cent return and excluding rentals, for 68,000 horsepower.

(2) \$4.49 per horsepower less than applicant's own estimate of \$17.88 (round figures \$18) at 8 per cent return and including Indian rental and irrigation cost, at 68,000 horsepower.

(3) \$4.33 per horsepower less than Montana Power Co.'s system generating cost of 1926 at 8 per cent return.

(4) \$12.05 per horsepower less than Montana Power Co.'s system generating cost of 1926 at actual return and excess.

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(5) \$13.13 per horsepower less than Montana Power Co.'s system generating cost of 1926 with Thompson Falls additional power due to Flathead storage added at actual return and excess.

As already pointed out, the difference between the inter-company wholesale price and the annual average generating cost represents the economic rental value of the site and this should be divided between the Indians as a tribe and the general public interest (of which of course the Indians as individuals also form a part) in fair proportion. In other words, the Indians have the ownership of the five sites and of that portion of the Flathead Lake that lies within the reservation, while the State of Montana owns the remainder of Flathead Lake and the right to control the use of the waters in the lake and river over and above the prior rights of the Indians. Thus both the Indians and the general public have rightful interests in the

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Flathead power development. Hence it would seem fair that whatever economic rental value this site has should be divided either approximately half to the Indians as a tribe and half to the public, or if it is really possible to determine their respective interests more exactly, that this rental value should be apportioned pro rata between them. In this connection it may be said that there are now being made in the Federal Power Commission and in the General Land Office studies of the Indian tribal lands and of Indian allotment lands, and that these seem to indicate that the Indian interests in the power development are 46.5 per cent and the non-Indian interests 53.5 per cent. However, as these studies appear to be somewhat tentative and perhaps open to certain legal uncertainties relating to the easements upon lands bordering on the lake, it seems best for the purposes of this memorandum to assume 50 per cent of the economic rental value of the site as belonging

to the Flathead Indians as a tribe, and the other 50 per cent as belonging to the general public of the State of Montana. It is perhaps superfluous to add that the Indian rental will be paid to the Federal Government in trust for the Indians, and the public's interest will be under the care and protection of the Montana Public Service Commission in its regulation of the Rocky Mountain Power Co. and the Montana Power Co.

Applying the above, we have:

	Per horse- power	Round figures
Intercompany price as fixed by applicant .....	\$17.88	\$18.00
Average annual generating cost at Flathead .....	13.39	13.39
	<u>4.49</u>	<u>4.61</u>

One-half for Indians would equal, say, \$2.25 per horsepower as the proper rental, as calculated from an annual average of 80,500 per horsepower.

Another slightly more conservative way of estimating the economic rental value of Flathead site No. 1 would be to use as our intercompany wholesale price the average annual generating cost including the same basis of 8 per cent return of the Montana Power Co. system.

Thus we have:

	<u>Per horse-power</u>
Intercompany price, using cost of Montana Power Co. system .....	\$17.72
Average annual generating cost at Flathead .....	13.39
	<u>4.33</u>

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One-half for Indians would equal \$2.16½ per horsepower as the proper rental, as calculated from an annual average of 80,500 horsepower.

Using the mean of these two calculations, we have \$2.21 per horsepower as a fair rental for the Indians.

If we take \$2.21 per horsepower as Indian rental we have \$15.60 per horsepower, i. e., 2.387 mills per kilowatt-hour as the adjusted average generating cost, including 8 per cent return and Indian rental. This price of 2.387 mills per kilowatt-hour for an intercompany price would

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pay to Rocky Mountain Power Co. a return of 8 per cent and provide all the operating expenses including depreciation of 2 per cent and amortization charge of 0.6 per cent, which will fully amortize the investment in 50 years, if invested at 4¼ per cent, and pay an annual rental to the Indians of \$2.21 per horsepower per year. All of the public's share above referred to would under this basis through the low intercompany price be transferred from the Rocky Mountain Power Co. to the Montana Power Co. and be under regulation in that company. If, however, the higher intercompany price of 2.75 mills per kilowatt-hour, (\$18 per horsepower) were utilized the public's share would remain in the Rocky Mountain Power Co., also under regulation. There would be no difference, so far as the public interest is concerned, because in the proposed license it will be required that the securities of the Rocky Mountain Power Co. shall be regulated by the Federal Power Commission and that no bonus stock will be possible, and that all the equity-carrying common stock of the Rocky Mountain Power Co shall be owned and be retained by the Montana Power Co. This will make possible complete regulation.

As has been shown the Indian rental for Flathead site No. 1 is obtainable only from the licensee, Rocky Mountain Power Co., and to the amount of one-half of the advantage of this site over the average of the Montana Power Co.'s system. However, the other one-half from the Rocky Mountain Power Co. accruing to the public will be added to the existing excess of the Montana Power Co. and be available under regulation for the general consumers. Thus, combining the figures for the two companies, with such a price of 2.387 mills per kilowatt-hour after paying the Rocky Mountain Power Co.'s 8 per cent return and the Indians' \$2.21 per horsepower, there would still be available for the irrigation project and general consumers under regulation the following:

	<u>Per horsepower</u>
With 8 per cent return only .....	\$2.18
With 8 per cent return and present excess .....	9.90
With 8 per cent return and excess, and including additional power at Thompson Falls due to Flathead.....	10.98

The above figures apply to generation alone. If the return on the whole system were limited under regulation to 8 per cent, the possible rate reductions might be still further increased, as already indicated. It is especially to be noted that the above figures, including \$2.21 per horsepower to the Indians, make the estimated cost to the applicant less than its own estimated cost at Flathead by \$1.88 per horsepower, or 0.288 mills per kilowatt-hour. Thus if it were to its advantage to lease Flathead under its own estimates rather than to develop another one of its smaller and less desirable sites, it remains so still even with this higher rental to the Indians.



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Another opportunity to compare the low cost of current at Flathead with general costs for current, resulting in a difference in favor of an increased Indian rental, is found in the following extract from the hearings (p. 1549):

Mr. Scattergood. There is no more virtue in that figure of a dollar to the Indians per horsepower? There is no final virtue, I would say, because you offered it?

Mr. Cochrane (chief engineer). That figure, I can explain, was a figure which was made because in our—without making any detailed estimate as to what

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we could afford to pay for this particular site we said general power at a site like this may be worth \$20 a horsepower. We are selling that at Great Falls and used that as a general figure without making any estimates, and that a dollar a horsepower—that is, 5 per cent of that probably would not be a ruinous figure.

Mr. Cochrane was here speaking "by the book" when he spoke of "power like this being worth \$20 a horsepower at a site like this." As a matter of fact the system generating cost of current sold at their plants, including an 8 per cent return on the company's own valuation, has been shown above to have been, in 1926, \$20.92; if the 5.84 per cent excess is added it was \$9.11 per horsepower more, or a total of \$30.03 per horsepower on all system sales.

Now if this general figure of "\$20 per horsepower" is set over against the \$13.39 cost conservatively estimated to be the cost, including 8 per cent return, at Flathead site No. 1, it would seem proved from Mr. Cochrane's own statement that \$2.21 for the Indian rental could amply be afforded without reducing at all the company's present high basis of earnings.

Another slant on the "nominal" offer of \$1 per horsepower made without regard to the site's earning power is found in its origin in the nominal charge of \$1 per horsepower formerly made by the United States Forest Service, but now no longer in use.

The following developed in the hearings (p. 1549-1550):

Mr. Kerr (when Mr. Cochrane was on the stand). Mr. Cochrane did not make that price (the \$1 per horsepower rental). I made that price. I will tell you how I made it. It was the forest rule.

Mr. Scattergood. But that rule is no longer in existence.

Mr. Kerr. It was at that time, and we are paying at that rate now. (He refers to some other plants of the system on forest lands.)

Mr. Scattergood. You have passed from that time, have you not?

Mr. Kerr. Yes. They predicated that rule—

Mr. Scattergood. Because it was not an adequate rule?

Mr. Kerr. That is what it was based on.

Mr. Scattergood. Thank you very much for enlightening us on that, Mr. Kerr. I thought it was not based on any calculation of the earning power of this site, because it is, of course, inadequate in that respect.

The next day the hearings proceeded (pp. 1615-1617):

Mr. Scattergood. Mr. Cochrane, you heard Mr. Kerr mention that the \$1 a horsepower proposed to be paid to the Indians for rental had been taken from the scale that had been used by the Forestry Department. Do you know anything about that?

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Mr. Cochrane. Well, that refreshes my memory on the subject a little bit, and I presume that that was where the figure originated, but as for our average—that is, in assuming that figure, we assumed that it was not based on detailed calculations as to how much we thought this site was worth or how much we could be forced to pay for it, or anything of that kind; it was just a fair nominal figure taken without analysis.

Mr. Scattergood. That is just what I thought it was. Now, in the matter of this Forestry scale, do you know whether that scale is still in existence in the Forestry Department?

Mr. Cochrane. I don't know for sure; no.

Mr. Scattergood. Do you know anything about it?

Mr. Cochrane. No.

Mr. Scattergood. You don't know whether I am right in the impression that I gained from the head of the Forestry Service that it no longer exists?

Mr. Cochrane. I don't know of my own knowledge; no.

Mr. Scattergood. Well, do you know whether or not, when it was in existence, it measured anything on the basis of actual values of sites, or was it, just as you say, nominal?

Mr. Cochrane. That is my impression, that it was nominal, arbitrary.

Mr. Scattergood. Would there have been any particular reason for the United States Government on public lands to charge anything but a nominal

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value? There would be no object in the Government doing it, would there? I mean nominal rental when I say value.

Mr. Kelly. Five per cent of the gross value of the product is hardly nominal.

Mr. Cochrane. I think perhaps "arbitrary" should be used instead of the word "nominal" in this computation.

Mr. Scattergood. What I meant to say was wouldn't it be a fact that whatever charge was made by the United States Government would have to be carried through into the rate and be loaded upon the consumers.

Mr. Cochrane. In the same way that any other charge would be; yes, sir.

Mr. Scattergood. So that in public lands and forestry cases, where there is no special ownership involved as there is in the case where Indian property is held in trust, there is no reason for the Government to make the consumer pay anything more than the real fair cost and the proper return to the company?

Mr. Cochrane. I wouldn't think there would be any object in the Government requiring the customer to pay more than a fair charge in any event.

Mr. Scattergood. That is what I think, too, and I want to just bring it out, that so far as that nominal charge is concerned, it was nominal and was not meant to in any way measure the value of the site; and as a matter of fact that scale no longer exists.

From the above tracing of the origin of the \$1 offer it is apparent that the company was working on the assumption that the basis of rental for an Indian site might be the same as for forest or public lands, overlooking the distinction between the Government trust for the Indians in the first case and outright ownership by the Government in the second. The company was accustomed to paying the nominal \$1 per horsepower rental for the forest lands, and apparently assumed that this would be considered sufficient for Indian lands. Admittedly as Mr. Cochrane says, the company "did not base its offer on detailed calculations as to how much we thought this site was worth."

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It is this lack of "detailed calculations" as to what the site is really worth to the Government in trust for the Indians that the Indian Bureau is now attempting to supply in this memorandum, and we believe a sound basis is found to be furnished for the rate of \$2.21 per horsepower in the figures above presented on the basis of 80,500 horsepower.

It may also be added that so far as the Indians are concerned from a direct financial standpoint alone, the above rental payments would lie to the advantage of the Rocky Mountain Power Co. The general consumers of the State would also profit more in possible rate reductions from the Flathead development than would be the case if the license were given to Mr. Wheeler. On the other hand, Mr. Wheeler's plans, if successful, would bring real advantages of other kinds through the introduction of new industries, new employment, new markets, etc.

#### MINIMUM RENTAL PAYMENTS

Another phase of Indian rental besides its rate remains to be considered.

Under Regulation 14, section 5 of the commission, it is provided that "The charge (for Indian rental) shall commence upon date license is issued."

There will necessarily be a considerable period for construction before the power will be available and earnings begin. Both applicants estimate a construction period of three years. Mr. Wheeler will take longer to get started because he has not made preliminary borings. He will also have to complete his financing and marketing plans which will take some time. He will lose 1930 low-water season. Rocky Mountain Power Co., as already pointed out, has not only

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made borings, but is ready to start a construction gang immediately to work, and hopes, if granted the license, to divert the Flathead River for building the foundation of the dam in the low-water season of 1930. It is also to be noted that Mr. Wheeler at this stage is applying only for a preliminary permit for all his sites, while Rocky Mountain Power Co. is applying for both preliminary permit for four sites, and license for site No. 1. Hence in Wheeler's case, rental to the Indians will be delayed; if Rocky Mountain Power Co. is given the license, a rental will begin immediately.

The basis of rental calculation and the rates for the first 20 years suggested above are upon the assumption of the actual development of the estimated prime power. The factors in the calculation are purposely conservative, and, as heretofore stated, the estimate will probably be exceeded over the 20-year period. However, a rental so calculated would clearly not be applicable to a long construction period when no income would be obtainable. Accordingly, the Indian Bureau would suggest that for said construction period, i. e., from the date of the license to the date when the first power from Flathead is sold, an arbitrary fair minimum amount be fixed in the license by the commission and the Secretary of the Interior, say at the rate of \$20,000 per annum.

If the license is granted to the Rocky Mountain Power Co., another consideration must also be provided against for the proper protection of the Indians. That is to provide that the Flathead plant shall not be used any more than any of the other plants as a "peak load plant" in the Montana Power Co. system. This means that it should and must be so operated as to develop at least its pro rata share of the system annual load factor, and not

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be used only at peak times and "starved" at other times. It is not to be expected that the merging of the Flathead plant into the full-load factor of the system can be obtained the first year, probably not for three or four years. It would therefore seem fair to suggest that in the license it be provided that from the date when the first power from Flathead is sold, the rate of \$2.21 per developed horsepower shall apply, but that the company be given time to develop its full-load factor at Flathead on the following basis of progressive minimums for the early years, viz:

First year, applicant shall operate Flathead at an annual load factor (calculated the same as for the system) of not less than 60 per cent, based on the actual peak for 15 minutes.

Second year, the same except of not less than 67½ per cent load factor.

Third year, the same except of not less than 75 per cent load factor.

Fourth year and thereafter at not less than the system load factor.

In case the load factors developed at Flathead should fall below these minimums, then rentals to be based at the \$2.21 rate on the minimums, the same as if they had been reached.

If Mr. Wheeler is given the license, it would seem from his own plans that he hopes to be able to start off immediately with his load more fully developed than on the usual company basis. He should, however, be required to pay progressive minimum rentals, and after say the fourth year, be required to pay not less than 83 per cent of his full load, using there the same load factor as applies to the other applicant.



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CAPITALIZED VALUE OF SITE NO. 1 BASED (1) ON INDIAN RENTALS;  
(2) ON MONTANA POWER CO.'S VALUATION OF "INTANGIBLES"

The full annual earning power of site No. 1 for the Indians from Mr. Wheeler would be:

(1)  $105,000 \times \$1.12\frac{1}{2} = \$118,125$  on his own basis of 6,000 cubic feet per second of water.

(2)  $95,000 \times \$1.12\frac{1}{2} = \$106,875$  on the basis of 5,440 cubic feet per second of water. Capitalizing these at 8 per cent (the return allowed the licensee) gives: (1) \$1,476,562; (2) \$1,335,937.

A similar calculation for Rocky Mountain Power Co. as adjusted gives:  $80,500 \times \$2.21 = \$177,905$  per annum. Capitalizing this at 8 per cent (the return allowed the licensee) gives \$2,223,812. It is clear that on this basis the latter applicant is better for the Indians on direct financial results.

Let us now make a further comparison with the Montana Power Co. system.

If this were a power development other than on Indian or public lands, the cost of site would be included in the prelicense cost of development allowed by the commission. For comparison let us add this to the estimated plant cost to find what the total investment cost per horsepower would be. We would have:

Estimated plant cost .....	\$7,555,400
Site, if purchased .....	2,223,812
Total .....	<u>9,779,212</u>

$\$9,779,212 \div 80,500 = \$121.48$  per horsepower as development cost. This compares with \$127.04 for the Montana Power Co. system in 1926, assuming that the company's

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own valuation of its generating plants at \$27,626,333 includes the values of power sites. Also it is to be seen that \$121.48 is very reasonable and is in fact low as compared to the great majority of power sites.

If, however, these company valuations do not include the values of the sites, then the values of the sites must be included in the company's "intangibles," which it describes as "water rights, contracts, franchises, etc." For purposes of comparison, let us now apply to the Flathead project the company's own valuation of these intangibles and so determine a figure comparable to the company's valuation set up, and find what per horsepower the site would be worth on this basis.

In the Montana Power Co. system the 1927 report shows:

Tangibles .....	\$46,952,039=47.6%
Water rights, etc. ....	51,699,423=52.4%
Total .....	<u>98,651,462=100%</u>

Assume the same proportion for Flathead.

Now the estimated plant cost at Flathead with-

out any value for site is .....	\$7,555,400
This is 47.6 per cent of .....	15,872,689
52.4 per cent of \$15,872,689 is .....	8,317,289

We then have:

Tangible plant .....	\$7,555,400
Intangibles, including water rights, etc., would be .....	<u>8,317,289</u>
Total value would be .....	15,872,689

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The development cost would then be: \$15,872,689÷80,500 horsepower=\$197.18 per horsepower.

Using the same operating ratio of 14.3 per cent including the 8 per cent return as is used in the Rocky Mountain estimate as adjusted, we would have:

	<u>Per horsepower</u>
Annual generating cost, including 8 per cent return .....	\$28.00
As compared to .....	13.39
Increase due to "Intangibles" .....	14.61

On this basis of the company's own "watered" valuations, Flathead site No. 1 would show \$7.30, that is one-half of \$14.61 per horsepower for the Indians instead of the proposed \$2.21 per horsepower. Manifestly the company would not wish to see the Indians claim the same basis of valuation as it has used itself.

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#### CONCLUSION

In concluding this memorandum on the Flathead power development, we are pleased to state that it seems possible at last to solve this complex problem which has been so fraught with disputes for such a long time, and do it to the satisfaction of all of the interests involved. Upon analysis it has developed that the advantages and resulting low costs of this power site will make it possible (1) to give the developing licensee a full return upon the investment; (2) to considerably increase the Indian rental beyond the offers made or even the expectations of the Indians;

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(3) to provide for the full amortization of the power development cost during the 50-year period of the lease and at the close of the lease its return to the Government for the Indians as a going concern fully paid for, then to be released or otherwise disposed of as may then seem best; (4) to accommodate the irrigation project by the granting in full of its request for cheap power; (5) should the license be granted to the Rocky Mountain Power Co., to make available from the Flathead development itself and from the beneficial effects therefrom upon the Thompson Falls plant of the Montana Power Co. certain further amounts which under the regulation of the Montana Public Service Commission will be available for rate reductions for the benefit of the general consumers of the latter company; (6) should the license be granted to Mr. Wheeler, to make available from the Flathead development advantages to the Indians and other people of that section from the introduction of new industries, with resulting opportunities for new employment, new markets, etc.; (7) to establish a method of calculation of Indian rentals for power sites; (8) to provide for proper regulation by the Federal Power Commission in conjunction with the State public service commission that is involved, of the licensee that makes the development.

Respectfully submitted.

J. HENRY SCATTERGOOD,  
*Assistant Commissioner.*

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49 SUPPLEMENTAL MEMORANDUM

MAY 14, 1930.

HON. RAY LYMAN WILBUR,

*Secretary of the Interior.*

SIR: Supplementing Indian Bureau's revised memorandum dated December 30, 1929, in re Flathead power development, we now submit the following further statement:

APPLICANT ROCKY MOUNTAIN POWER CO.  
SELECTED FOR SITE NO. 1

It will be remembered that the applications received were—

(1) From Rocky Mountain Power Co. for final license for immediate development of Flathead site No. 1, and for preliminary permit for investigating sites Nos. 2, 3, 4, and 5.

(2) From Walter H. Wheeler for preliminary permit for investigating all five sites Nos. 1, 2, 3, 4, and 5.

In the Indian Bureau's memorandum just referred to, the facts and variables relating to power as to both applicants were set forth, without an effort to consider the ability to market and to finance, or the practicability of the plans of applicant Wheeler for fertilizer manufacture, etc. We understand that you have received reports in relation to the feasibility of the manufacture of fertilizer from the experts in the Agriculture Department; also that the Federal Power Commission on the showings made by the applicants have recommended that the Rocky Mountain Power Co. be awarded the license for site No. 1 as applied for, provided satisfactory terms of Indian rental could be agreed upon,

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and that applications from both applicants for preliminary permits upon the other four sites be rejected.

#### INDIAN RENTALS

Reference is made to our previous memorandum where we showed the inadequacy of the offers of Indian rentals made by either of the two applicants. We are pleased now to be able to state that this view has been amply supported by the separate studies made by the Federal Power Commission and by the Army Engineers, the latter having been requested by the Secretary of the Interior to make a fresh and independent study. For the sake of the record all of the different studies are here briefly summarized.

#### THREE METHODS OF CALCULATION OF INDIAN RENTAL

There are three methods by which Indian rentals can be set up: (1) At a fixed rate per horsepower produced; (2) at a combination of fixed charge and energy charge; and (3) at a flat rental basis, regardless of the amount of output. These are further described as follows:

(1) *At a rate per horsepower and estimated at a "spot" of production.*—The first method was prepared in the offers of the two applicants.

Rocky Mountain Power Co. offered \$1 per horse-power-year. At the hearings it estimated on 5,400 cubic feet of water per second, resulting in 80,000 horsepower prime power for site No. 1, which is the same as per the Federal Power Commission formula. However, this

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50     applicant further estimated a utilization factor of only 85 per cent, thus reducing the estimate of prime power capacity produced and taken to 68,000 horsepower, which at \$1 per horsepower would have made \$68,000

average Indian rental for site No. 1 on a "spot" basis of 68,000 horsepower.

Applicant Wheeler offered \$1.12½ per horsepower-year. At the hearings he submitted, based on 6,000 cubic feet of water per second, an estimate of prime power capacity for site No. 1 of 105,000 horsepower using a higher over-all efficiency factor (87½ per cent) than the commission and a utilization factor of 100 per cent. On this "spot" basis of 105,000 horsepower, the Indian rental at \$1.12½ per horsepower would be \$118,125 for site No. 1. Applicant Wheeler's figures would, however, be subject to reduction on account of the commission's limitation to 1,100,000 acre-feet of storage (10 feet difference of levels) on account of certain as yet unsolved problems which will result from changing the levels of the lake. As stated in our revision of our previous memorandum, this would result in only 5,440 cubic feet of water per second instead of 6,000 cubic feet and would reduce applicant Wheeler's prime power capacity from 105,000 horsepower to 95,000 horsepower. At \$1.12½ per horsepower Mr. Wheeler's Indian rental on the "spot" basis of 95,000 horsepower would be reduced to \$106,875.

In our previous revised memorandum, an effort was made to develop an Indian rental rate per horsepower comparable to the two offers made by the applicants. This calculation was likewise based upon 5,440 cubic feet of water per second, resulting in a prime power capacity of 80,500 horsepower. On this basis, the cost per horsepower was estimated to be \$13.39 per horsepower-year to Rocky Mountain Power Co., and \$14 (for 95,000 horsepower) for Mr. Wheeler. Rocky Mountain Power Co. proposed in the hearings a selling price of \$18 per horsepower including \$1 per horsepower for the Indian rental and \$1 estimated cost per horsepower of supplying the irrigation district with power at specified low rates. It was also shown that

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the cost per horsepower including 8 per cent return to Montana Power Co. in the year 1926 was \$17.78, said return being based upon the company's valuation of tangible values. (It may be said in passing, that if this basis of valuation is a pre-war cost plus actual additions since 1913 at cost, it would be comparable with the net investment cost basis used in the above applicants' calculations).

On the further assumption that the Flathead Indian Tribe and the general public are each entitled to about one half (approximately in proportion to their interests in the Flathead River and Lake), this figures that for applicant Rocky Mountain Power Co. on a "spot" basis of 80,500 horsepower, the Indian rental would be \$2.21 per horsepower, which equals \$177,905 per annum. The irrigation district, if it actually costs anything other than secondary power, will be supplied from the public's share. As to applicant Wheeler, his selling price is limited by his plan to \$15 per horsepower; his cost as adjusted would be \$14, leaving only \$1 for the Indians, assuming that they would get it all, and the public's share would be in the low price to the new industries that he would hope to attract. In this case, the irrigation district would not be considered at all.

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51      (2) *Combination of a fixed rental plus an energy charge.*—This second plan of estimating Indian rental was used by (a) Federal Power Commission in its schedule of January 2, 1930; (b) Army engineers (when specially called upon by the Secretary of the Interior for an independent study of February 27, 1930 and revised March 29, 1930); and (c) by the Indian Bureau in its Schedule No. 2 dated April 1, 1930, and which was discussed by the Secretary of the Interior with the Montana congressional delegation. All of these estimates were based on studies of the variables with a view that after the production cost including fair return to the company



had been covered, any further margin of profit should be divided between the Indians and the public (through the company under regulation). The variables were (1) development cost; (2) transmission line cost (in the Army schedule only); (3) annual operation charges; (4) annual transmission charges (in the Army schedule only); (5) revenue at Flathead, and at Anaconda (in the Army schedule only). In effect, this kind of a schedule of rates is one of adopting a minimum fixed rental charge up to a given horsepower development, plus an energy charge for development above that point and at such a rate as will divide the excess between the Indians and the public (through the company under regulation). This plan results in a constantly diminishing cost per kilowatt-hour to the company and in a steadily rising rate of rental per horsepower to the Indians, and is in effect a profit-sharing arrangement and is the kind that is often used in contracts for wholesale power.

The advantage in this plan is that in the higher brackets of power production, the Indians would be able to secure considerably greater rentals. The disadvantage is that in the lower brackets where the profit is insufficient even for a fair return to the company, the Indians must either run the risk of little or no rental or they must be given a fair minimum rental. Even this minimum will then show a heavier loss to the company than it proved willing to agree to. Furthermore a number of difficulties were encountered in all these profit-sharing plans in providing against any possibility of the use of the Flathead plant for peaking purposes only or in dull times the giving to it of only a reduced proportion of the entire system load, and in general the avoiding of the temptation to starve this plant in order to reduce the Indian rental. Four months of negotiations were consumed in discussing those various plans and the variables upon which they were based and we were never able to reach an agreement. Several dead-

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locks actually developed with the breaking off of negotiations. Finally efforts on these lines were abandoned and a new approach was entered upon with the plan of a flat rental.

For the record there are appended hereto the three schedules referred to above which were proposed for discussion respectively by Federal Power Commission, the Army engineers, and the Indian Bureau.

(3) *Flat rental*.—The third plan of a flat rental basis was finally agreed to on terms as set forth below. This plan of rental has the advantages of (1) reducing all risks to the Indians and providing an assured, definite and uniform rental regardless of the amount of use of the plant by the licensee; (2) it avoids the difficulties of assuring to the Flathead plant its fair porportion of system load; (3) it avoids

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52 any inducement that Flathead be used for peaking purposes, or that it be starved unduly at high water periods when other plants of the system could carry an increased share of the load; (4) it avoids all problems arising from any form of partnership of the Indians with the licensee; and (5) it eliminates subjecting the Indians to the ups and downs of business and to industrial depressions, a feature which especially exists in Montana, where the electric demand is so largely industrial in character. In the case of applicant Wheeler, whose plan provided for an exclusively industrial load, this business variation of load would have had its maximum effect upon Indian rentals.

The basis of agreement as to Indian rentals reached with Rocky Mountain Power Co. is as follows:

Article 30: (a) The licensee shall pay into the United States Treasury as compensation for the use, in connection

with this license, of the Flathead Indian tribal lands annual charges computed as follows:

(1) A charge at the rate of \$1,000 per calendar month, beginning with the month in which the license is issued and extending to and including the month in which the project is placed in commercial operation. For the purpose of the payments under this article, the beginning of commercial operation shall be considered as the time when one of the licensee's generating units shall have been installed, tested, and demonstrated to be in suitable condition to produce electric energy for commercial purposes with a reasonable degree of reliability.

(2) A charge at the rate of \$5,000 per month, beginning with the calendar month next succeeding the date on which the project is placed in commercial operation and extending to the end of the calendar year in which such commercial operation shall commence.

(3) For each full calendar year from and after the 1st of January next following the date on which the first unit is placed in commercial operation, annual charges will be as follows:

	<u>Per year</u>
For the first two years.....	\$60,000
For the third year.....	75,000
For the fourth year.....	100,000
For the fifth year.....	125,000
For the next five years.....	150,000
For the next five years.....	160,000
For the next five years and/or until readjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of par. (D) of this article 30.....	175,000

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(B) Payments shall be made for each calendar year within 30 days after the close thereof on bills rendered by the commission.

(C) Pursuant to the provisions of the act of March 4, 1929 (45 Stat. 1640), all charges for reimbursing the United States for the cost of administration of the Federal water power act have been and are hereby expressly waived.

(D) The annual charges payable under this license may be readjusted at the end of 20 years after the beginning of operation under this license and at periods of not less than 10 years thereafter by mutual agreement between the commission and the licensee, with the approval of the Secretary of the Interior. In case the licensee, the commission, and the Secretary of the Interior can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of

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53 readjusted charges shall be submitted to arbitration in the manner provided for in the United States arbitration act (U.S.C., title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in section 5 of regulation 14 of the commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development.

The Indian Bureau believes this scale of rentals forms a very satisfactory settlement. It greatly exceeds the offers made by both applicants. For purposes of ready comparison we append a chart which shows the agreed rentals, the original offers, and also the estimates based upon studies of the variables made by the Indian Bureau, the Federal Power Commission, and the Army engineers.

From this it will be noticed how closely all the estimates converge in the zone of 70,000 to 85,000 horsepower, which are the probable points of usual development.

#### GUARANTY

The guaranty for performance of Rocky Mountain Power Co. is made—

(1) by Montana Power Co., the parent company, guaranteeing the completion of the installation by Rocky Mountain Power Co. (the subsidiary company) of three units of 50,000 horsepower each or a total of 150,000 horsepower within four years, i. e., to start construction within one year and to complete construction within three years thereafter;

(2) by Montana Power Co. entering into a contract with Rocky Mountain Power Co. for the 50-year period of the lease to take all of its production of electric energy except such current as is taken by the United States for the reservation and the irrigation district up to a maximum of 15,000 horsepower. Said electric energy is to be paid for by the Montana Power Co. on the basis of actual cost, including Indian rental plus 8 per cent return upon the net investment cost. This will be an assurance of a market for the entire period of the license and will in effect act as a guaranty that Rocky Mountain Power Co. will be able to carry out its obligations, including the payment of Indian rentals.

#### POSSIBLE INCREASE OF WATER FLOW IN FUTURE

As stated above, the Federal Power Commission has set a limit in the present license (and in accordance with the application) of 10 feet of storage in Flathead Lake, making a minimum of 1,100,000 acre-feet. If in the future, the problems of the lake levels can be safely solved, so that the Federal Power Commission will feel warranted in allowing a greater storage to be developed than 10 feet,

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then it will be in order for an application to be filed for the amending of the license. Such a proceeding will result in a corresponding increase of Indian rental based upon the increased earning power of site No. 1. It is hoped that at least by the time the first readjustment of rental is made at the end of 20 years, it will be possible that this increase of storage will have been found feasible.

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#### CORPORATE SET-UP AND REGULATION IN THE PUBLIC INTEREST

It is especially gratifying to the Indian Bureau that the license as drawn carries out so fully its suggested plan of corporate set-up and regulation and which in these respects forms a model lease. This includes the continuance of the separate corporate existence of Rocky Mountain Power Co., which is a very important consideration in the simplification of accounting and future calculations for Indian rental readjustments. It has also been agreed by the applicant that all of its (the subsidiary's) securities are to be held unless otherwise allowed by the Federal Power Commission in the treasury of the Montana Power Co. (the parent company) or by a trustee for it, and that all of these securities shall be sold to Montana Power Co. for cash or its equivalent. This means no bonus securities and no over-capitalization.

It may be said in passing that so far as proper regulation and corporate set-up is concerned it is not necessary that all of the securities of the subsidiary should continue to be held in the parent company's treasury. It is sufficient that only the equity-bearing common stock be so held and the bonds and preferred stock, if any, could as well be sold to and be held by the public. In this case, however, the company prefers to sell to the public Montana Power Co. securities and to retain in its treasury or in the hands of a trustee all of the securities of the subsidiary.

The license also provides that in the intercompany agreement between the subsidiary and the parent companies, as already stated, the intercompany price of current will be sufficient and only sufficient approximately to cover the actual operating costs, including Indian rental plus an 8 per cent return upon the actual legitimate investment as established under the provisions of the Federal water power act. This means that this intercompany cost-plus-return price will be based upon the prudent investment valuation, and will be a bedrock price. For regulation as between the Federal and State Commissions, this is an ideal arrangement in that under the Federal license the return will be limited to 8 per cent upon cost, 8 per cent being the prevailing allowed rate in Montana; and there will be turned over to the pool of the Montana Power Co. and be put under State regulation the entire production of the subsidiary (except the power taken by the United States) at this lowest possible price. We have already shown in Indian Bureau's memorandum of December 30, 1929, that this cost at Flathead site No. 1 will be less than the average cost of the Montana Power Co.'s system as shown in the year 1926. Hence the coming into the Montana Power Co.'s system of this lower cost current (with its return on generating investment already taken care of) should have the effect of lowering the average cost of the entire system, and, under the State regulation, be of advantage to all of the consumers on its lines. The gain at Thompson Falls will likewise have a favorable effect. Thus, not only the Indians but the general public of Montana should be the gainers by the Flathead development.

In this connection it is important to note that this low intercompany price will be a matter of open publicity through the annual reports of the subsidiary and the parent companies as rendered to the

State commission. This will therefore serve as the "yardstick," so often referred to in public-ownership cases, by which the actual cost-plus return on cost will be always available. This clean cut and open publicity is one of the most important factors in successful regulation of public utilities. We believe that this Flathead case as arranged can be taken as a model lease in this respect.

#### IRRIGATION DISTRICTS

It will be remembered that in 1927, and again in 1928, the applicant had voluntarily agreed to sell to the United States for the irrigation district up to 15,000 horsepower at prices of 1 mill for 10,000 horsepower and 2½ mills for 5,000 horsepower. In Indian Bureau's memorandum of December 30, 1929, it was shown that the latter price of 2½ mills is greater than the estimated cost at Flathead site No. 1, including return and Indian rental. Hence, on the 5,000 horsepower block there will be no loss. On the block of 5,000 horsepower at 1 mill for pumping and 5,000 horsepower at 1 mill for general uses and for sale, there will probably be very small loss, if any, because much of this use will be at the time of secondary power. However, even if the load factors are as the applicant has estimated and a part is primary power, we have shown in our memorandum of December 30, 1929, that after the calculation of the Indian rental, by a slight increase in the intercompany price, the small cost of this power will be provided for without in any way affecting the Indian rental.

It may be added that in all our negotiations regarding the Indian rentals this matter of the irrigation power was completely ignored. It was recognized by the company's representatives, as well as by those representing the Government, that at Thompson Falls there will be developed, because of Flathead storage, more than twice as many ad-



ditional kilowatt-hours than can possibly be used in the entire irrigation 15,000 horsepower demand. Hence, this delivery of this power can and will be provided without the slightest effect in reducing the Indian rental.

Accordingly there have been included in the license the features desired by the irrigation project and already agreed to, as stated, viz:

- (1) The agreement to supply the 15,000 horsepower at the prices previously stated.
- (2) To refund the \$101,000 to the Government for the cost of Newell Tunnel, which will be completed and used by applicant for river diversion during construction.
- (3) The supplying to the project up to 500 horsepower at line voltage during the construction period.
- (4) The right to use Flathead Lake and River water above the dam for irrigation purposes, provided not more than 50,000 acre-feet shall be used after July 15 in any year.

#### AMORTIZATION

It will be recalled that in the Indian Bureau's memorandum of December 30, 1929, we recommended that if legally possible under the special powers of the Secretary of the Interior in this case it would be desirable to provide for an amortization charge of 0.6 per cent

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56 to be included in the licensee's operating expenses and that such charges should be set aside in an amortization fund and kept invested and reinvested in such fund, so that at the end of the 50 years of the lease the property might be recaptured and be turned back to the Indians fully paid for. This desirable feature proved to be impossible of accomplishment because under the

Federal water power act, no such setting up of an amortization charge is provided for, nor could the Secretary's powers be stretched to include such a power against the licensee's resistance. There is, however, provision that after 20 years of the license, certain provisions in reference to surplus earnings being used for amortization shall become operative. As under the set-up of this license there will be no appreciable surplus earnings, this provision will not be operative.

However, the right of recapture for the Indians at the end of 50 years exists under the Federal water power act, and can be exercised provided a fund will be available to meet the outstanding net investment cost to the licensee. To provide such a fund it would be possible, if thought desirable and if approved by the Indians, for Congress to set aside each year from the funds of the Indians an amount sufficient at compound interest to build up such an amortization fund.

#### RECOMMENDATIONS

(1) The Indian Bureau recommends the issuance of the license for site No. 1 for immediate development as now agreed upon to Rocky Mountain Power Co.

(2) The Indian Bureau repeats its hope, as expressed in the previous memorandum, that a way may be found for the early exploration with a view to development, of the Flathead sites Nos. 2 to 5 so that the Indians may have a revenue from them at the earliest possible date.

Applicant Rocky Mountain Power Co. has stated in the hearings that it would not soon proceed to such development even if granted the preliminary permit. Applicant Wheeler has urged that if granted a preliminary permit, he believes he could secure actual contracts for the sale of power. Although it is recognized that he has not yet made

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a sufficient showing of ability to market the power, yet it is hoped that he may be at least given an extension of time to do so, so far as sites Nos. 2 and 5 are concerned, rather than be rejected outright. If there is any real chance of his exploiting the possibilities of these other four sites for industrial development, it would seem desirable to give him opportunity for a limited time to show what he can do.

Respectfully submitted,

J. HENRY SCATTERGOOD,  
*Assistant Commissioner.*

Approved:

C. J. RHOADS, *Commissioner.*

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#### APPENDIXES

Federal Power Commission schedule, January 2, 1930.

Army Engineers' schedule, February 27, 1930; revised March 29, 1930.

Indian Bureau schedule No. 2, April 1, 1930.

Copy of license issued May 23, 1930, to Rocky Mountain Power Co. for site No. 1.

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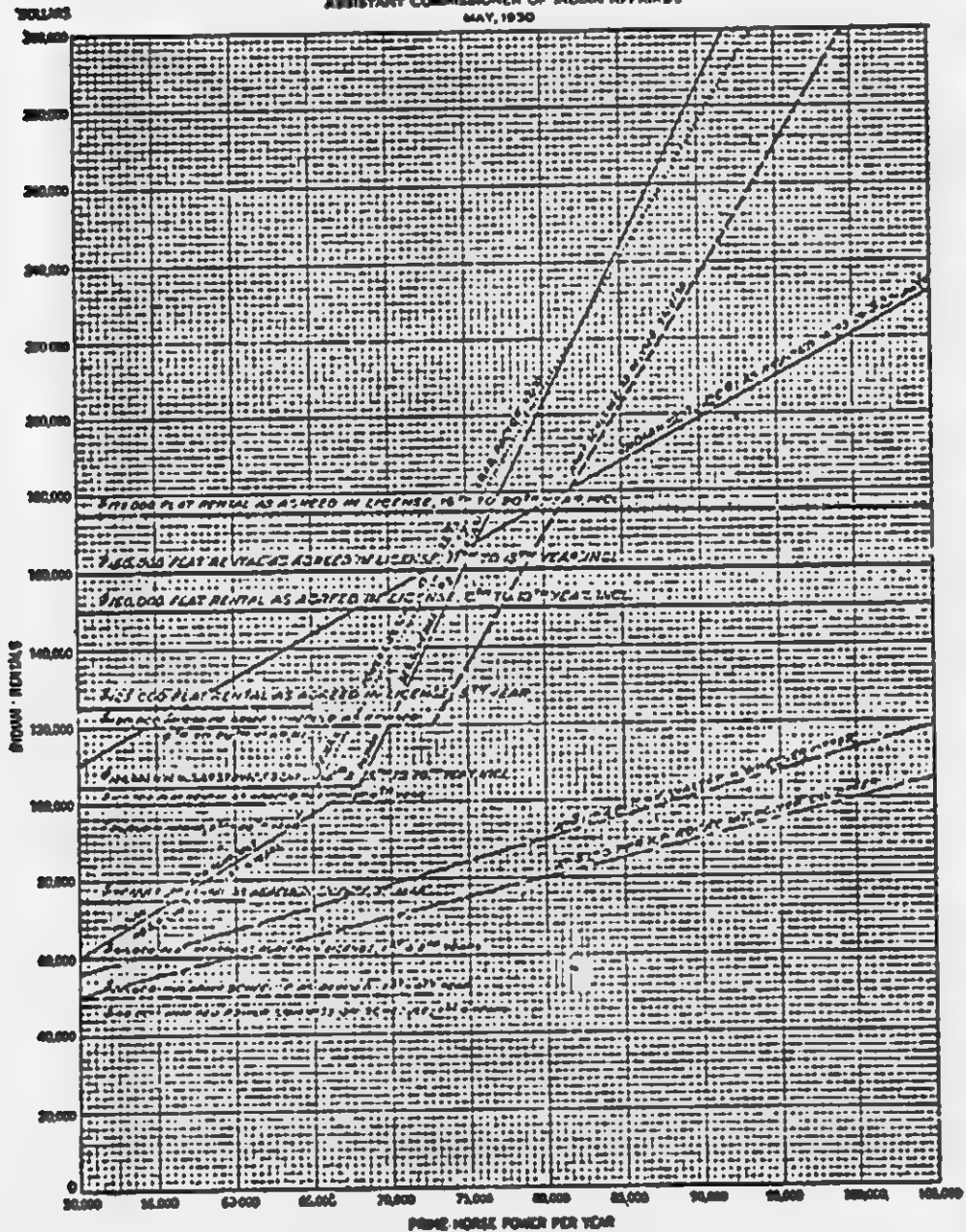
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# FLATHEAD POWER DEVELOPMENT

## DEPARTMENT OF THE INTERIOR OFFICE OF INDIAN AFFAIRS FLATHEAD POWER SITE NO. 1 INDIAN RENTAL ESTIMATES

RESULTING FROM STUDIES OF THE VARIABLES BY INDIAN SERVICE, FEDERAL POWER COMMISSION AND ARMY ENGINEERS

COMPILED BY  
J. M. SCATTERGOOD  
ASSISTANT COMMISSIONER OF INDIAN AFFAIRS.  
MAY, 1930



## SUGGESTED FEDERAL POWER COMMISSION SCHEDULE

*Proposed Charge for Indian Land*

JANUARY 2, 1930.

In the event the commission decides to authorize a license for site 1 in the above case, it appears that the following may offer a rough outline of a logical method for determining the reasonable charge to be fixed for the use of the Indian land.

The uncertainties make this problem difficult. Obviously, there is no exact answer. The appraisal of a water-power site value constitutes a most complex engineering study under any circumstances and when the project is for public utility purposes the difficulties are magnified. This is because no tangible basis for comparison is offered. Any advantage of one site over another may not be capitalized by the developing public utility agency and, therefore, the value to the utility lies only in the more economical or reliable service it may be permitted to give the public. Under these circumstances it would appear that the four primary factors which will probably operate to limit, but not necessarily fix, the appraised value are the following:

1. Cost of power at load centers from alternate sources.
2. Present value of power at load centers.
3. Possibility of marketing power site with some other agency.
4. Value of lands for some other purpose than power development.

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Section 5 of regulation 14 provides:

When licenses are issued involving the use of tribal lands embraced within Indian reservations, the commission will fix a reasonable annual charge for the use thereof, based upon the commercial value of the land for the most profitable purpose for which suitable, including power development. The charge shall commence upon date license is issued.

It will be noted that the regulations contemplate specific consideration of the fourth factor noted above; but in the present case the value for any other purpose than water power, in so far as the Indian lands are concerned, may be dismissed from consideration. The Indian land bordering the lake shore will not be affected above the natural high-water level, and the very small area actually to be occupied by the project works below the lake outlet is confined to the precipitous canyon territory where there are no commercial values.

The third factor likewise is of little importance in this case. In many respects the Flathead Lake site is highly attractive but with the abundant supply of cheaply developed water power resources throughout the Northwest, it will probably be many years before the development of markets will progress to the point where the isolation of this site may be overcome and its full development warranted by some agency other than the public utility now serving that immediate territory.

It seems necessary, therefore, to relate the appraisal to the first two factors noted above. Factor No. 1, which contemplates comparison with an alternate source of power, has already been studied to a considerable extent by Mr. Henshaw. It appears that the most favorable alternate source for developing a block of power similar in

quantity and characteristics to that possible at Flathead will be a combination of Site C on the Missouri River and the reconstruction of the Canyon Ferry project. Site C would have to be built first in order to provide spare capacity for the system and thus allow the existing Canyon Ferry plant to be dismantled. The main elements of these two units are presented by Table 1 and a comparison with Flathead by Table 2. These are based mainly on Mr. Henshaw's data. On this rough basis of comparison a differential of \$2.19 per horsepower in favor of Flathead is indicated before consideration of the Indian charge.

Mr. Cochrane stated (Tr. p. 2284) that under present schedules, approved by the State regulatory agency, energy is being wholesaled in large blocks at Anaconda for from \$25 to \$30 a horsepower and at Great Falls for somewhat less. On this basis of about 4 mills per kilowatt-hour at Anaconda and 1.5 mills transmission cost, including losses, it would appear that the Flathead output might be valued at around 2.5 mills switchboard without increasing present rates.

The estimated cost of the Flathead development is approximately \$7,500,000, which seems fair, although in my judgment this figure is more likely to be exceeded than reduced. The annual charges, adopting the 12 per cent basis, will be about \$900,000 a year. The company estimates somewhat more. At 2½ mills a kilowatt-hour the annual generation must reach 360,000,000 kilowatt-hours to offset the annual charge exclusive of any Indian rental. The site is capable of producing a great deal more, and the most specific basis for the charge will be a schedule which makes equitable division of revenue beyond costs between the Indians on the one hand and the public interests of the State on the other. Necessarily, such a schedule must

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incorporate various safeguards such as minimum charges, etc., which protect the Indian interests, but at the same time encourage the company to make the largest practicable utilization of the available resources.

An approximation of an equitable division of interest between the Indians and the public may be derived as follows: As Mr. Henshaw points out, a development confined exclusively to tribal lands and without artificial regulation of the lake might be made which would have a primary capacity of 37,440 horsepower ( $2,600 \times 180 \times 0.08$ ). Ownership of the resources for such a project lies entirely with the Indian tribe. Constructed to 60,000 horsepower installed capacity, such a project would probably cost around \$5,000,000.

From preliminary calculations and subject to correction by the detailed status check now being made by Mr. Orcutt, it appears that tribal lands affected by regulation of the lake itself will amount to about 25 per cent of the total. The division of interest in the entire project between Indian and public interest combining these various factors may be calculated as follows:

$$\frac{37,500}{80,000} = 46.875 \text{ per cent (of project exclusively Indian).}$$

$$\frac{\$5,000,000}{37,500} = \$133 \text{ per horsepower (for project without regulation).}$$

$$\frac{\$2,500,000}{42,500} = \$59.80 \text{ per horsepower (for additional power from regulation).}$$

$$\frac{\$133}{\$59.8} = 2.2 \text{ (ratio of value in favor of storage power).}$$



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Indian interest:

46.875×1 .....	46.875
53.125×2.2×0.25 .....	29.218

Indian total .....	76.093 = 46.5%
Public interest = 53.125×2.2×0.75 ....	87.654 = 53.5%
Combined total .....	163.747 = 100 %

Such computation is by no means conclusive, but it serves as an indication of the comparative interests.

The schedule of Indian charge, attached hereto, aims to apply the principles outlined in the foregoing discussion. While merely tentative and probably embracing some defects, it should at least be helpful in offering something tangible for further study and discussion. The schedule embodies the principles which by long experience have been found most sound for power sale contracts and at the same time it disposes automatically of the questions of efficiency factors, utilization factors, etc., regarding which there has been considerable futile discussion in this case. It will be desirable, of course, that the charge be divided between a peak charge and an energy charge in order to prevent the plant being utilized primarily for peak and stand-by purposes. Also, certain substantial minimum rentals are provided to protect the Indian interests. A discount of the energy charge during the season of high flow might be suggested with the thought that by such means more complete utilization would be attained and consequently larger revenue obtained for the Indian fund than the minimum charges which otherwise may logically result. This feature, however, has been omitted in this presentation in order that the schedule may be kept as simple as practicable. It will be noted that the plan provides for no deduction from the Indian charge on account of energy that may be furnished to the irrigation district.

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The company will be required to pay the same charges on such energy as it does on the energy transmitted to Anaconda and elsewhere. On the whole, the plan appeals to me as being eminently fair not only to the Indians but also to the company and the consuming public.

The following tabulation illustrates the operation of the schedule for varying rates of production at 75 per cent load factor:

Output at rate of kilowatt hours per month	Equivalent average horsepower	Peak load charge	Annual charge energy	Total rental	Average per horsepower
30,000,000	55,074	\$34,056.00		<sup>1</sup> \$ 48,000.00	\$0.87
35,000,000	64,253	41,100.00	\$ 55,200.00	96,300.00	1.50
40,000,000	73,432	49,140.00	110,400.00	159,540.00	2.17
45,000,000	82,544	58,176.00	165,600.00	223,776.00	2.72
50,000,000	91,790	68,196.00	220,800.00	288,996.00	3.15
55,000,000	100,976	79,176.00	276,000.00	355,176.00	3.52
60,000,000	110,148	90,120.00	331,200.00	421,320.00	3.83

<sup>1</sup> Established by minimum charge of \$4,000 per month during first 5 years and would be doubled in case this low output occurred after fifth year of operation.

A chart which offers ready means for estimating the charges under different conditions is attached hereto. It is of interest to note that the Indian revenue from operation at the rate of 50,000,000 kilowatt-hours a month which reasonably may be anticipated as the market and

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62 the site reach full development will amount to \$289,000 a year. Capitalized at 6 per cent this represents a valuation of practically \$5,000,000 for the Indian interest in the project.

F. E. BONNER,  
Executive Secretary.

## MR. BONNER'S PROPOSED SCHEDULE OF INDIAN CHARGE

The licensee shall pay into the United States Treasury as compensation for the use of Flathead Indian tribal lands (and administrative expenses of the United States) in connection with this license as annual charge for each calendar year subject to the following conditions:

A. The amount of the charge will be the sum of the 12 monthly charges each of which shall be calculated as follows:

(1) *Peak load charge*.—First 45,000 kilowatts or less of maximum load, \$2,250 per month; next 15,000 kilowatts of maximum load, \$0.06 per kilowatt; next 10,000 kilowatts of maximum load, \$0.07 per kilowatt; next 10,000 kilowatts of maximum load, \$0.08 per kilowatt; next 10,000 kilowatts of maximum load, \$0.09 per kilowatt; all over 90,000 kilowatts of maximum load, \$0.10 per kilowatt.

(2) *Energy charge* (to be added to demand charge): First 30,000,000 kilowatt-hours per month, no charge; all over 30,000,000 kilowatt-hours at following rates: First 400 kilowatt-hours per kilowatt of proportional peak load, \$0.001 per kilowatt-hour; next 150 kilowatt-hours per kilowatt of proportional peak load, \$0.0007 per kilowatt-hour; all over 550 kilowatt-hours per kilowatt of proportional peak load, \$0.0004 per kilowatt-hour.

(3) *Minimum charge* will be \$1,000 per month beginning with the month in which license is issued and extending to the month next preceding that within which the project is placed in commercial operation; thereafter the minimum charge (inclusive of the combined peak and energy charges) for each month shall be \$4,000 per month until the beginning of the fifth calendar year after the date on which the project is placed in commercial operation; and thereafter the minimum monthly charge shall be \$8,000 per month.

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B. The licensee shall be required to install, operate, maintain, and periodically test such meters and other equipment as may be required for measuring, in terms of kilowatts of peak load and kilowatt-hours, the output of electric energy produced by the generating units of the plant, and representatives of the commission may at any time have the right to inspect and test such meters and other equipment in the presence of a representative of the licensee. The record of meter measurement shall be used as the basis of the charge calculations: *Provided, however,* That in case any installed meter shall during any period of time for any reason fail to register the output correctly the record of output for such period shall be estimated from the best data available.

C. Promptly after January 1 of each year the licensee shall forward to the commission a record of the peak load and total energy output for each month of the preceding calendar year. After such verification as may be deemed desirable by the commission this record will be made the basis of the annual charge and a statement rendered the licensee which shall be paid within 30 days of receipt.

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63 D. For calculating the peak load charge the maximum load of each month will be considered as that average kilowatt output of the 30-minute interval in which the output of electric energy is greater than in any other 30-minute interval in the same month. For calculating the energy charge the proportional peak load will be derived by taking the proportion of the maximum load that the output for the month in excess of 30,000,000 kilowatt-hours bears to the total output for the month.

E. The annual charge may be readjusted at the end of 20 years after the beginning of operation under this license

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and at periods of not less than 10 years thereafter upon the basis used in the original determination and upon the facts as found by the commission at such times of readjustment.

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SUGGESTED ARMY ENGINEERS' SCHEDULE

WAR DEPARTMENT,

*Washington, February 27, 1930.*

The SECRETARY OF THE INTERIOR,

*Acting Chairman Federal Power Commission,  
Department of the Interior, Washington, D. C.*

DEAR MR. SECRETARY: 1. In response to your recent request for a recommendation on the amount which the Rocky Mountain Power Co. should pay to the Indian Bureau for flowage rights in connection with a license for the construction of a power plant on the Flathead River, you are advised that based on the data submitted I have had a study made under the direction of the Chief of Engineers, who advises that the conclusions of that study are as follows:

(a) That the revenue should be derived, first, from a fixed yearly demand charge, and second, from an energy charge, the latter to be sufficiently low to make it worth while for the company to generate as much power as can be absorbed in the system.

(b) That no unnecessary restrictions should be placed on the method of operating the plant by the power company, such as a peak load penalty, as it is believed that this will have the effect of reducing the usefulness of the plant and will not provide additional return to the Indian Bureau.

2. The following conditions are recommended as being fair to all parties concerned and are based on computations made from information supplied by your office:

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**Fixed charge:** The power company shall pay to the Indian Bureau for the privileges granted under this license a fixed charge at the rate of \$1,000 per month from the time that this license is issued until the time when the plant starts generating power for other than test purposes. As soon as the plant starts generating power for other than test purposes, the company shall pay at the rate of \$60,000 per year until the beginning of the fifth calendar year, at which time the fixed charge shall be increased to \$125,000 per year, and shall be continued until the expiration of this license, unless modified under the terms thereof.

**Energy charge:** In addition to the fixed charge, the company shall pay for energy generated as follows: For the first 420,000,000 kilowatt-hours per annum during the time that the fixed charge is \$60,000 per

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64 annum, and for the first 475,000,000 kilowatt-hours per annum thereafter, no additional charge shall be made. For all energy generated over these amounts, the company shall pay at the rate of 1 mill per kilowatt-hour.

The energy shall be metered at the plant at generator voltage.

3. In arriving at the above recommendations, certain assumptions were made and certain figures were accepted, as follows:

Cost of development, not including transmission line, \$8,000,000.

Installed capacity, 150,000 horsepower.

Regulated low flow 90 per cent of time, 5,400 second-feet.

Average head, 185 feet.

Over-all plant efficiency, 85 per cent.

Prime power capacity, based on 90 per cent time flow,  
71,000 kilowatts.

Prime power output per annum with 100 per cent load  
factor, 622,000,000 kilowatt-hours.

Sale price of power delivered at end of transmission  
line, \$25 per horsepower-year, or 3.83 mills per kilo-  
watt-hour.

Cost of 2-circuit, 132,000-volt transmission line 140  
miles long from plant to Anaconda, \$3,000,000.

4. Based on the above data and the details of the cost as  
stated by the power company, it was computed that the  
total annual fixed and operating charges on the plant, not  
including the transmission line, would be approximately  
\$1,000,000, divided as follows:

Interest at 7 per cent .....	\$560,000
Operation, maintenance, and overhead .....	200,000
Taxes at 2 per cent .....	160,000
Depreciation, 1 per cent .....	80,000

5. In order to arrive at the net revenue at the plant, a  
transmission line loss in energy of 12 per cent was assumed,  
and fixed and operating charges of the transmission line  
were computed as follows:

Interest at 7 per cent .....	\$210,000
Depreciation at 1½ per cent .....	45,000
Patrol at \$100 per mile per year .....	14,000
Maintenance and repairs at 0.5 per cent ....	15,000
Taxes at 2 per cent .....	60,000
Overhead and contingences .....	6,000

Total .....	350,000
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6. From the above computations, the curves shown on  
the attached sheet were drawn to show the difference be-

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tween annual charges and the revenue derived from power generated.

7. It was considered that the fixed charge should be sufficiently large to protect the Indian Bureau in case the company desired to maintain the plant in a stand-by condition, but should also be low enough so that the power company could earn this charge under any foreseen condition. The lowest flow of record, occurring for 8 months during 1919 and 1920, gave a regulated flow under the assumed conditions of 0.62 cubic foot per second per square mile of drainage area. This flow corresponds to a 100 per cent prime power capacity of 57,000 kilowatts, or an output at the rate of 500,000,000 kilowatt-hours per year. It is to be expected that during a dry period of this character the load factor on a storage project of this kind would be at least 95 per cent, and it was therefore concluded that the company could produce under the worst conditions at least 475,000,000 kilowatt-hours per year or 76.4 per cent of the 90 per cent time flow output.

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65      8. From the curve it will be seen that the difference between the cost of producing this amount of power and the revenue derived therefrom would be approximately \$250,000. Obviously, all of this difference should not be credited to the Indian Bureau. In order to arrive at the proportion which should be so credited, the value of storage derived from the use of Indian lands was computed as follows:

The 90 per cent time unregulated flow corresponds to a prime power capacity of 33,300 kilowatts, or an output of 291,000,000 kilowatt-hours per annum. Using 76.4 per cent of this figure of 220,000,000 kilowatt-hours per annum as the minimum power which would be generated with a run of river plant, the revenue derived from the curve is



shown to be \$400,000. The cost of a run of river plant of this kind is estimated at \$5,000,000, on which the fixed and operating charges were calculated to be \$650,000 per annum. Therefore, with the minimum output mentioned above, there would be a net loss of \$250,000. The effect of storage therefore is to convert a loss of \$250,000 per year into a profit of \$250,000 per year based on a minimum output, or in other words the value of storage is \$500,000 per annum.

9. It is estimated that 25 per cent of the storage lands belong to the Indian Bureau and therefore the minimum amount which should accrue to the bureau is \$125,000 per year, which is the recommended fixed charge.

10. In arriving at the recommendations for the energy charge, a figure was selected which would encourage the power company to generate as much power as could be sold, and thus insure the maximum return to the Indian Bureau.

Sincerely yours,

PATRICK J. HURLEY,  
*Secretary of War.*

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MARCH 12, 1930.

Hon. B. K. WHEELER,  
*United States Senate.*

MY DEAR SENATOR WHEELER: In response to your request when I appeared before the Senate Interstate Commerce Committee on March 5, I desire to assure you that the larger the development of the Flathead power site under the figures contained in the Army engineers' report the lower will be the estimated generating costs of current per kilowatt-hour.

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I inclose two tables which set out, respectively, the approximate rentals and costs of current for the period before the fifth calendar year and for the period from the fifth year to the twentieth year when the rentals are subject to revaluation. These tables show the total rentals, the increasing rates per horsepower, and the decreasing estimated costs of current per kilowatt-hour.

From these tables it is easy to observe the basis for the Army engineers' statement that a schedule was recommended "which would encourage the power company to generate as much power as could be sold and thus insure the maximum return to the Indian Bureau." You will realize also that when the full installation has been made which both of the applicants have specified (viz, 150,000 horsepower) it will not be possible for either of them to obtain the needed current for their growth at as low a cost as one mill per kilowatt-hour through development elsewhere.

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66 I also have your letter of the 6th, with inclosures from Mr. Walter H. Wheeler addressed to you and Senator Walsh, which I have noted and return herewith. Mr. Wheeler's figures do not readily convey the whole story of the Army engineers' recommended basis for Flathead Indian rentals.

As you are aware, the two propositions before the commission are entirely different and not directly comparable. One is an application for a license for and the prompt construction of the Flathead Lake storage and the upper power site at the foot of Flathead Lake. The other is for a preliminary permit granting the permittee the right to investigate during a period of three years the possibilities of the Flathead Lake storage, the upper power site at the foot of Flathead Lake and the four lower power

sites on the Flathead River, with the option of applying for a license prior to the expiration of the permit, but with no obligation to apply for such license. The figures submitted by the Chief of Engineers, United States Army, show what he considers should be paid to the Indian Bureau for its interest in the Flathead Lake storage and the power site at the foot of Flathead Lake. The figures do not cover the four lower sites on Flathead River, nor can they be extended to apply to those sites. Neither of the applicants has the information on the physical conditions existing at the four lower sites to enable him to make even general estimates of the cost of development nor is such information in possession of the Government. Under these circumstances, you will appreciate, I think, that it is impossible at this time to fix upon a rental for the four lower sites with any degree of fairness to the Indians.

Mr. Wheeler bases the rental which he would pay for site No. 1 on an estimated average output of 105,000 horsepower, and that which the Rocky Mountain Power Co. would pay on 71,000 horsepower after the fifth year of operation. Obviously, the potential power of the site is the same in either case; the differences merely result from the judgment of the two applicants, and would not be realized in practice. The estimate of the engineers of the War Department assumes an average output of 95,000 horsepower, which seems more reasonable than estimated by either of the applicants.

For Senator Walsh's information, I am also sending him a copy of this letter.

Very sincerely,

RAY LYMAN WILBUR.

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REVISION OF SUGGESTED ARMY ENGINEERS' SCHEDULE

WAR DEPARTMENT  
OFFICE OF THE CHIEF OF ENGINEERS,

*Washington, March 29, 1930.*

The EXECUTIVE SECRETARY FEDERAL POWER COMMISSION,  
*Department of the Interior, Washington, D. C.*

DEAR SIR: 1. In accordance with your letter of March 26, 1930, Montana-Rocky Mountain Power Co., the estimate submitted by the Rocky Mountain Power Co. on the capital and annual cost of a transmission line proposed for the Flathead Lake project, has been reviewed.

2. It is considered that the costs as given by the Rocky Mountain Power Co. are higher than can be reasonably expected. An estimate based on such data as are available in this office has been made on a

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67 double transmission line on wooden H-type supports, including a separate telephone line and a 100,000 kilovolt-ampere substation. The first cost of such a line, 140 miles long, and of the substation is estimated at \$2,950,000. Annual fixed and operating charges, including interest at 7 per cent per annum, are estimated to be \$369,000.

3. In the letter from the Secretary of War to the Secretary of the Interior, dated February 27, 1930, the fixed and operating charges on a double circuit line were given as \$350,000. In view of the above increased cost of transmitting energy under the conditions outlined by the Rocky Mountain Power Co., the following modifications in the charges for flowage rights on the Indian lands as recom-

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mended in the letter referred to above are considered to be equitable:

(a) The fixed charge given as \$60,000 per year should be reduced to \$50,000 per year.

(b) The fixed charge given as \$125,000 per year should be reduced to \$120,000 per year.

(c) All other charges and conditions should remain as originally recommended.

4. A chart dated March 27, 1930, showing the difference between annual charges revised as above and the revenue derived at various rates of output, is inclosed.

Very truly yours,

HERBERT DEAKYNE,  
*Brigadier General,*  
*Acting Chief of Engineers.*

*Interpretation of Flathead Site No. 1, Army engineers' rental recommendations*

UNTIL FIFTH CALENDAR YEAR

Capacity developed			Estimated generating cost per kilowatt-hour before rental <sup>1</sup>	Indian rental			Estimated generating cost per kilowatt-hour, including rental <sup>1</sup>
Horse-power	Kilo-watts	Kilowatt-hours		Fixed charge	Energy charge	Total	
			Mills				Mills
65,000	48,750	427,050,000	2.42	\$60,000.00	\$ 7,050.00	\$ 67,050.00	\$1.37
70,000	52,500	459,900,000	2.19	60,000.00	39,900.00	99,900.00	1.91
75,000	56,250	492,750,000	2.03	60,000.00	72,750.00	132,750.00	2.36
80,000	60,000	525,600,000	1.90	60,000.00	105,600.00	165,600.00	2.76
85,000	63,750	558,450,000	1.79	60,000.00	138,450.00	198,450.00	3.11
90,000	67,500	591,300,000	1.69	60,000.00	171,300.00	231,300.00	3.43
95,000	71,250	624,150,000	1.60	60,000.00	204,150.00	264,150.00	3.71
100,000	75,000	657,000,000	1.52	60,000.00	237,000.00	297,000.00	3.90
105,000	78,750	689,850,000	1.45	60,000.00	269,850.00	329,850.00	4.19
110,000	82,500	722,700,000	1.38	60,000.00	302,700.00	362,700.00	4.39

FIFTH TO TWENTIETH YEAR

Capacity developed			Estimated generating cost per kilowatt-hour before rental <sup>1</sup>	Indian rental			Estimated generating cost per kilowatt-hour, including rental <sup>1</sup>
Horse-power	Kilo-watts	Kilowatt-hours		Fixed charge	Energy charge	Total	
			Mills				Mills
65,000	48,750	427,050,000	2.42	\$125,000	0	\$125,000	\$2.56
70,000	52,500	459,900,000	2.19	125,000	0	125,000	3.37
75,000	56,250	492,750,000	2.03	125,000	\$175,750	142,750	2.53
80,000	60,000	525,600,000	1.90	125,000	50,600	175,600	2.92
85,000	63,750	558,450,000	1.79	125,000	83,450	208,450	3.27
90,000	67,500	591,300,000	1.69	125,000	116,300	241,300	3.57
95,000	71,240	624,150,000	1.60	125,000	149,150	274,150	3.85
100,000	75,000	657,000,000	1.52	125,000	182,000	307,000	4.09
105,000	78,750	689,850,000	1.45	125,000	214,850	339,850	4.31
110,000	82,500	722,700,000	1.38	125,000	247,700	372,700	4.52

<sup>1</sup> Includes 7 per cent interest on \$8,000,000 investment and 1 per cent interest for depreciation.



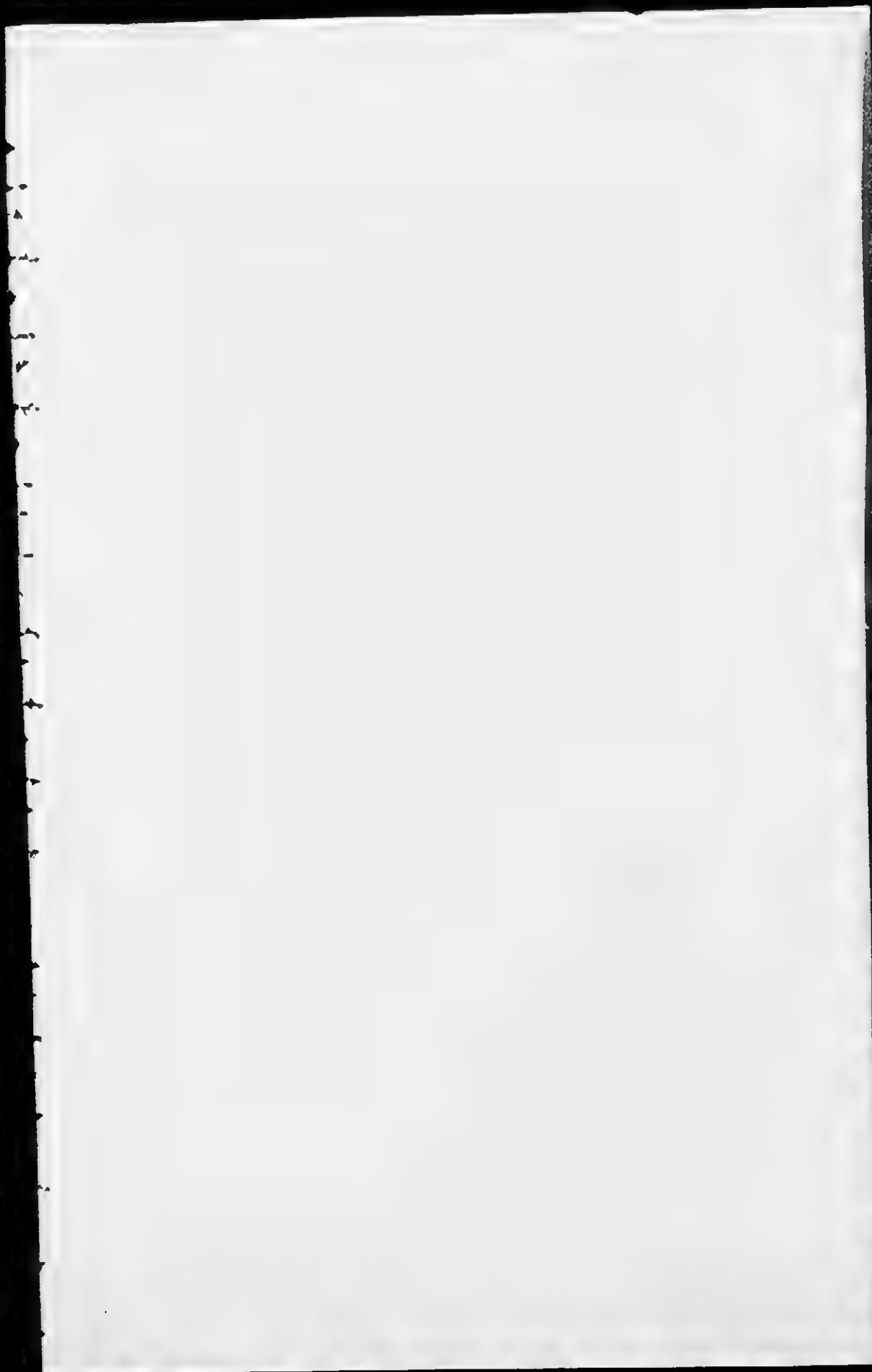
SUGGESTED INDIAN BUREAU'S SCHEDULE No. 2, APRIL 1, 1930  
Flathead site No. 1.—Revised rental recommendations  
FIFTH TO TWENTIETH YEAR

Horsepower	Capacity developed (kilowatt-hours at 6535)	Revenue at switch at \$18 (2.75 mills)	Return to company—								Cost to company, including rental and 8 per cent return—				Indian rental			
			Based on \$7,555,400 development cost				Based on \$8,000,000 development cost				Based on \$7,555,400		Based on \$8,000,000		Fixed charge	Energy charge at 1¼ mills	Total	Per horse-power
			Operating charges <sup>1</sup>	Rentals	Return		Operating charges <sup>2</sup>	Rentals	Return		Amount	Per kilowatt-hour	Amount	Per kilowatt-hour				
					Amount	Per cent			Amount	Per cent								
												<i>Mills</i>	<i>Mills</i>					
60,000 .....	392,100,000	\$1,080,000	\$352,662	\$104,400	\$622,938	8.24	\$366,000	\$104,400	\$609,600	7.42	\$1,061,494	2.71	\$1,110,400	2.81	\$104,400	.....	\$104,400	\$1.74
65,000 .....	424,775,000	1,170,000	352,662	104,400	712,938	9.44	366,000	104,400	699,600	8.74	1,061,494	2.50	1,110,400	2.61	104,400	.....	104,400	1.60
68,000 .....	444,380,000	1,224,000	352,662	104,400	766,938	10.15	366,000	104,400	753,600	9.42	1,061,494	2.39	1,110,400	2.49	104,400	.....	104,400	1.53
70,000 .....	457,450,000	1,260,000	352,662	121,212	786,126	10.40	366,000	121,212	772,788	9.66	1,078,306	2.36	1,127,212	2.46	104,400	\$16,812	121,212	1.73
75,000 .....	490,125,000	1,350,000	352,662	162,056	835,282	11.05	366,000	162,056	821,944	10.27	1,119,150	2.28	1,168,056	2.38	104,400	57,656	162,056	2.16
80,000 .....	522,800,000	1,440,000	352,662	202,900	884,438	11.71	366,000	202,900	871,100	10.89	1,159,994	2.22	1,208,900	2.31	104,400	98,500	202,900	2.54
85,000 .....	555,475,000	1,530,000	352,662	243,744	933,594	12.35	366,000	243,744	929,256	11.50	1,200,838	2.16	1,249,744	2.25	104,400	139,344	243,744	2.87
90,000 .....	588,150,000	1,620,000	352,662	284,587	982,751	13.01	366,000	284,587	969,413	12.12	1,241,681	2.11	1,290,587	2.20	104,400	180,187	284,587	3.16
95,000 .....	620,825,000	1,710,000	352,662	325,431	1,031,907	13.66	366,000	325,431	1,018,569	12.73	1,282,525	2.06	1,331,431	2.14	104,400	221,031	325,431	3.43
100,000 .....	653,500,000	1,800,000	352,662	366,275	1,081,063	14.31	366,000	366,275	1,067,725	13.34	1,323,369	2.02	1,372,275	2.10	104,400	261,875	366,275	3.66
105,000 .....	686,175,000	1,890,000	352,662	407,119	1,130,219	14.96	366,000	407,119	1,116,881	13.96	1,364,213	1.99	1,413,119	2.06	104,400	302,719	407,119	3.88
110,000 .....	718,850,000	1,980,000	352,662	447,962	1,179,476	15.61	366,000	447,962	1,116,038	14.57	1,405,056	1.96	1,453,962	2.02	104,400	343,562	447,962	4.07

Minimum, at \$8,700. Begin energy charge at 37,000,000 kilowatt-hours per month.  
<sup>1</sup> Operation and maintenance, \$63,000; overhead, \$63,000; taxes, 2 per cent, \$151,108; depreciation, 1 per cent, \$75,554; total, \$352,662.  
<sup>2</sup> Operation and maintenance, \$63,000; overhead, \$63,000; taxes, 2 per cent, \$160,000; depreciation, 1 per cent, \$80,000; total, \$366,000.

FLATHEAD POWER DEVELOPMENT





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Exhibit K

Letter dated August 16, 1934, to Hon. Frank R. McNinch,  
Chairman, Federal Power Commission, Washington, D. C.,  
signed by Harold Ickes, Secretary of the Interior.

(Received August 17, 1934)

THE SECRETARY OF THE INTERIOR  
WASHINGTON

August 16, 1934.

Hon. Frank R. McNinch,  
Chairman, Federal Power Commission,  
Washington, D. C.

My dear Mr. McNinch:

You have requested a statement of the position of this Department with respect to the pending application of the Rocky Mountain Power Company requesting an indefinite extension of the time set by its license for the completion of construction upon Power Site No. 1, Project No. 5, on the Flathead Indian Reservation in Montana.

After careful consideration, I find it impossible to approve the requested modification of the license.

Such an extension is, I believe, not authorized by any provision of law. Article 13 of the Federal Water Power Act provides that "the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the Commission when not incompatible with public interests." I do not believe that this provision can be fairly construed to authorize the granting of an indefinite extension of the fixed time for construction, some three years after the licensee has on its own initiative abandoned the work of construction.

Regardless, however, of the legal validity of the extension requested by the licensee, I am of the opinion that such

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an extension would be contrary to the best interests of the Flathead Indian Tribe. Toward this tribe the United States occupies a position similar to that of a guardian or trustee. The Department of the Interior is charged with the administration of this trust, and cannot agree to a waiver of the vested contractual rights of the Flathead Indian Tribe under the Rocky Mountain Power Company's license where no adequate compensation is offered by the said licensee.

Under the original license, approved by the Federal Power Commission and by the Secretary of the Interior on May 23, 1930, the Flathead Indian Tribe is entitled, upon the completion of construction of the power site in question, to receive royalties ranging

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from the sum of \$60,000 per year for the first two calendar years after the completion of construction to the sum of \$175,000 per year during and subsequent to the 16th year after construction. By the terms of the license, the licensee is required to complete construction on or before May 23, 1934. Should the time set for the completion of construction now be extended, the Flathead Tribe would receive only the preconstruction royalties of \$12,000 per year, and thereby lose the difference between this sum and the royalties promised to it. Moreover, the Indians of this tribe would lose the many incidental benefits unconnected with the receipt of royalties which would naturally accrue to them from the work of construction and the operation of the power site in the territory of their reservation. For these reasons any postponement of the time set by the license for the completion of construction would be prejudicial to the Flathead Tribe of Indians. That such a postponement is so regarded by them is indicated by the resolution of the

Flathead Tribal Council dated January 13, 1934, which has been presented to your Commission.

It might be reasonable to expect some sacrifice from the Indians concerned, and proper for this Department to consent thereto, if some imperious public interest so required. But I can see in the instant case no consideration of public policy to justify an indefinite extension of the time fixed by the license for the completion of construction. The convenience of the licensee is not such a consideration. At the time the licensee assumed the obligations of the license it chose to pay to the Flathead Tribe a fixed royalty, not dependent either upon the output of the power site or upon the profits of the licensee. The Flathead Tribe was to secure no additional benefits from any business successes of the licensee. It should not be expected now to assume the burdens of the licensee's financial distress. The licensee assumed the risks of profit and loss. Among those risks was the eventuality that changed economic conditions would render the construction and operation of the power site unprofitable. If such is now the case, the licensee may still be expected to meet its contractual obligations toward the Government as it would be expected to meet contractual obligations toward other individuals which turn out to be unprofitable. The loss of the licensee is not a loss to the Flathead Indians or to the public, and the relief of this loss is not a burden which considerations of public interest require the Flathead Indians or the public at large to bear.

At my request, the Solicitor of the Interior Department and the Commissioner of Indian Affairs suggested to the licensee that its application for an indefinite extension of time be modified

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so as to call for a definite extension not to exceed three years, and that the application be further modified so as

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to incorporate specified conditions, which would not only afford the Flathead Indians a partial compensation for the loss involved in even a three-year extension but would supply certain considerations of general public interest that would justify some sacrifice on the part of the Flathead Indians. The licensee has not seen fit to accept these suggestions or to modify in any way its pending application for an indefinite extension of time. It would not, therefore, be proper for me at this time to analyze the hypothetical conditions under which a suitable application by the licensee for a modification of its present license would merit the approval of this Department.

For the reasons indicated above this Department cannot approve the application which the licensee has made and cannot consider any application which it has not made.

You have requested the opinion of this Department as to further proceedings in this matter. I believe that nothing can be gained in the premises by any further hearings upon the present application of the licensee. I also believe that it would be injurious to the interests of the Flathead Tribe to grant any temporary extension of the time set for completion of construction, for the purpose of facilitating further negotiations. If the licensee desires to submit a new application for a definite extension of time I am sure that the fact of its technical default would not prevent your Commission and this Department from giving such application the attention it deserves. It is my belief that a reasonable time, not to exceed six months, should be allowed to elapse after default by the licensee before any steps are taken either to cancel its license or to bring legal action against it for damages.

In reaching the conclusion that no temporary extension should be granted to the licensee for the purpose of pro-

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tecting it from the stigma of default pending further negotiations, I have given due consideration to the fact that hearings on the pending application, begun on May 22, 1933, have been delayed in part for the convenience of this Department. In my opinion, such delay has not in any way prejudiced the position of the licensee. On May 22, 1933, the date of the first hearing, the licensee had already rejected a proffered one year's extension approved by your Commission and by this Department. At that time it was by its own admission unable to complete the work, abandoned two years before,

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by the contract date. By its own admission it had no intention then of resuming the work of construction. Had this Department on May 22, 1933 expressed the definite opinions which it now advances, the licensee could not possibly have avoided a default on the date set for completion of construction. Since the position of the licensee is, therefore, no different at this time than it was on May 22, 1933, no considerations of equity based upon the conduct of this Department can be adduced to support a further temporary extension. Such an extension, if for a period less than three years, could only prejudice the position of the Flat-head Tribe and result in useless delay. I believe that the delay in the institution of legal proceedings recommended above will secure to the licensee any opportunity it may reasonably desire for a reconsideration of its present position.

Sincerely yours,

Secretary of the Interior.

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**Item A by Reference: The license for Project No. 5  
and all amendments thereof.**

• • • •

**8855**

I, F. E. Bonner, Executive Secretary of the Federal Power Commission, do hereby certify that the following is a true copy of that portion of the minutes of the one hundred and sixth meeting of the Commission held on the 20th day of June, 1930, which refers to the approval of issuance of license to the Rocky Mountain Power Company for project No. 5:

“The Executive Secretary stated that the major license listed below had been executed since the meeting of the Commission on May 19, and recommended that the action in issuing the instrument, pursuant to authority given by the Commission, be approved.

“The Commission thereupon took action as follows:

“In order that the minutes of the Commission may contain record of the formal approval by the Commission of the license executed and issued by the Executive Secretary, under authority of the Commission's Orders, No. 2, it was voted that the license listed below

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accepted and issued on the dates respectively named,  
be and the same is hereby approved by the Commission:

*“License:*

Project No. 5—

Rocky Mountain Power Company.

Flathead River and Lake.

Flathead National Forest, Flathead Indian Res-  
ervation, and vacant public lands.

Flathead and Lake Counties, Montana.

Authorized May 19, 1930.

Accepted by licensee May 20, 1930.

License issued May 23, 1930.”

Witness my hand and the seal of the Federal Power  
Commission at Washington, D. C., this 7th Day of July,  
1930.

/s/ F. E. BONNER  
Executive Secretary.

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I, F. E. Bonner, Executive Secretary of the Federal  
Power Commission, do hereby certify that the following is  
a true and correct copy of that portion of the minutes of  
the one hundred and fifth meeting of the Commission held  
on the 19th day of May, 1930, which refers to the action  
taken by the Commission on the application of Rocky Moun-  
tain Power Company for a license for a power project  
(No. 5) on Flathead River and Lake, in Flathead and Lake  
Counties, Montana:

“In the matter of the application of Rocky Mountain  
Power Company, a corporation organized under the  
laws of the State of Delaware, for a license under the  
Federal water power act for a power project (No. 5)



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on Flathead River and Lake, and on lands of the United States partly within the Flathead National Forest and on tribal lands within the Flathead Indian Reservation, in Flathead and Lake Counties, State of Montana, involving the construction of a concrete dam, water conduits, a power house, and appurtenant equipment, and the storing of water by the regulation of Flathead Lake: Said applicant having submitted satisfactory evidence of its compliance with the laws of the State of Montana as required by section 9, subsection (b) of said act, and of its ability to carry out its proposed plans; notice of said application having been given and published as required by section 4 of said act, full opportunity having been given for all interested parties to be heard, and no application for said project or in conflict therewith having been filed by any State or municipality; the Commission thereupon found that said project will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses, and that the license will not interfere or be inconsistent with the purpose for which any reservation affected thereby was created or acquired, and thereupon approved the maps, plans, and specifications of the proposed project and project works, the plans of the dam and other structures affecting navigation having been approved by the Chief of Engineers and the Acting Secretary of War; and in pursuance of such approval and such findings authorized issuance of license for a period of 50 years subject to legal review under the direction of the Secretary of the Interior, to the provisions of said act, to the rules and regulations of the Commission pursuant thereto, to the execution of the guaranty and agreement by The Montana Power Company

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attached to the license and approval thereof by the Executive Secretary and the Secretary of the Interior, to the following special conditions, and to such further conditions, if any, as the Chief of Engineers may find necessary or desirable in the interests of navigation, or the Secretary of War shall deem necessary for the adequate protection and utilization of said lake and river:

“(a) The licensee shall be liable for all damages occasioned to the property of other including lands allotted in severalty to the Indians, by the construction, maintenance, or operation of said project works, or of the works appurtenant or accessory thereto, and in no event shall the United States be liable therefor; nor does this license guarantee the validity of any reservations contained in the patent to any allottee or other grantee of Indian lands, whether in trust or in fee.

“(b) The licensee shall clear of all trees, logs, brush, or other debris, up to elevation 2893, the margins of Flathead Lake and those portions of Flathead River which shall be used for reservoir purposes under this license, and shall dispose to the satisfaction of the Commission, or its designated representative, of all the brush and debris resulting from such clearing, together with all temporary structures and refuse left on public lands and reservations of the United States from the construction and maintenance of said project works. In addition, the license shall cut and remove any trees or brush lying above elevation 2893 which may be killed due to the regulation of Flathead Lake for storage purposes.

“(c) The licensee hereby recognizes the right of the United States to pump from the Flathead Lake or from

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Flathead River above licensee's dam for all purposes of irrigation on the Flathead irrigation project or the lands of the Flathead Reservation whether included in the irrigation project or not, not more than 50,000 acre-feet of water after July 15th of any one year.

“(d) The operations of the licensee, in so far as they affect the use, storage, and discharge from storage of the water of Flathead Lake, shall at all times be controlled by such reasonable rules and regulations as the Secretary of War may prescribe in the interests of navigation, and as the Federal Power Commission may prescribe in the interests of flood control and of the fullest practicable utilization of the waters of Flathead River and Clark Fork for power, irrigation, and other beneficial public uses.

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“(e) The licensee agrees that all rights acquired in connection with the project covered by this license and the use of water for the development of power shall be held subject to the rights which may be reasonably necessary for the complete development of the irrigable land, the domestic water supply requirements, and the water-power possibilities in the watershed above the project works. The licensee further agrees to waive objections to the subtraction of such water up to a maximum flow of 200 cubic feet per second, as may be authorized under either Federal or State authority for diversion out of the watershed above the project works.

“(f) The licensee may regulate Flathead Lake between elevations 2883 and 2893; provided, however, that the Commission retains the right, at any time prior to the beginning of commercial operation of the project, to define limits of such regulation between

elevations 2880 and 2893 in such manner as will make not less than 1,100,000 acre-feet of storage capacity available to the licensee, it being expressly understood that licensee shall not be restricted to less than ten feet between the minimum and maximum elevations within which to carry on its regulation of Flathead Lake. It is expressly understood that variation by the Commission of any limits of regulation which may be fixed as aforesaid, shall not affect the rentals provided for in paragraph (1) following. It is expressly understood that if and when water is pumped from Flathead Lake or from Flathead River above licensee's dam after July 15th in any year for purposes of irrigation as provided in paragraph (c) above, the licensee shall be permitted, in the months of January, February, and March of the next succeeding year, to regulate Flathead Lake, below the minimum elevation which may be fixed as aforesaid, to the extent necessary to enable it to recover the amount of water so pumped for irrigation purposes. Said elevations are in feet above mean sea level as determined by reference to a certain U. S. Geological Survey bench mark, elevation 2910.882 feet, stamped '2900 GN,' as now located and established at Somers, Flathead County, or to such other bench marks as may be established by the U. S. Geological Survey having the same datum. As a basis of determination of the aforesaid storage limits, the licensee shall complete the mapping of lands bordering Flathead Lake and River and of the lake bed between elevations 2878 and 2900 uniform with the maps already completed by the Geological Survey at the north end of the lake, and shall continue to finance the collection of records of ground water elevations in the area at the head of Flathead Lake, and the study and interpretation of such records. The licensee also agrees to perform such channel exca-

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vation and other work as may reasonably be required by the Commission for the purpose

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of flood control to the end that the normal flood levels of Flathead Lake shall not be increased by reason of the installation of the project works, and for the purpose of full utilization of storage and navigation.

“(g) In consideration of the use to be made of the partially completed Newell tunnel, the licensee shall pay into the treasury of the United States the sum of \$101,685.11, such payment to be made within nine months from and after the date of this license and to be a part of and included in the licensee's net investment in the project.

“(h) For the purpose of preventing the entrance of fish into the turbines of the power plant, the licensee shall install and maintain such fish stops or other equipment as may reasonably be prescribed by the Secretary of Commerce.

“(i) Coincident with the beginning of commercial operation of the project works and thereafter throughout the remainder of the term of the license, licensee shall make available, at the project boundary at or near the licensee's generating station, and the United States, for and on behalf of the Flathead irrigation project or the Flathead irrigation district, may take and, having taken, shall pay for, at the price of one mill per kilowatt hour: (1) electrical energy in an amount not exceeding 5,000 horsepower of demand to be used exclusively for pumping water for irrigation; and (2) electrical energy in an amount not exceeding 5,000 horsepower of demand for all project and farm uses and for resale. Such deliveries shall be made at such

standard voltage as may be selected by the Commission. The licensee shall also make available, at the voltage of the line from which service is taken, either at the project boundary at or near the licensee's generating station or at some more convenient place on the project to be agreed upon, and the United States, for and on behalf of the Flathead irrigation project or the Flathead irrigation district, may take and, having taken, shall pay for, at the price of two and one-half mills per kilowatt hour, additional electrical energy in an amount not exceeding 5,000 horsepower of demand for all project and farm uses and for resale.

“(j) The licensee shall, during the period of construction, deliver at line voltage and at a point to be agreed upon on the line or lines which it will construct to supply power for construction purposes, power for farm and project purposes on the Flathead irrigation project or the Flathead irrigation district in quantities required by the United States for said purposes up to a maximum demand of 500 horsepower, at the price of two and one-half mills per kilowatt hour.

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“(k) The United States reserves to itself or to the Flathead irrigation project management the exclusive right to sell power within the boundaries of the Flathead Indian Reservation, to the extent of 10,000 horsepower to be delivered for use and/or sale as provided in paragraph (i) above.

“(l)(A) The licensee shall pay into the United States Treasury as compensation for the use, in connection with this license, of the Flathead Indian tribal lands annual charges computed as follows:

“(1) A charge at the rate of \$1,000 per calendar month beginning with the month in which the license is issued and extending to and including the month in which the project is placed in commercial operation. For the purpose of the payments under this paragraph, the beginning of commercial operation shall be considered as the time when one of the licensee’s generating units shall have been installed, tested, and demonstrated to be in suitable condition to produce electric energy for commercial purposes with a reasonable degree of reliability.

“(2) A charge at the rate of \$5,000 per month beginning with the calendar month next succeeding the date on which the project is placed in commercial operation and extending to the end of the calendar year in which such commercial operation shall commence.

“(3) For each full calendar year from and after the first of January next following the date on which the first unit is placed in commercial operation, annual charges will be as follows:

For the first two years .....	\$ 60,000 per year
For the third year .....	75,000
For the fourth year .....	100,000
For the fifth year .....	125,000
For the next five years .....	150,000 per year
For the next five years .....	160,000 per year
For the next five years and/or until readjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of subparagraph (D) of this para- graph .....	175,000 per year

“(B) Payments shall be made for each calendar year within 30 days after the close thereof on bills rendered by the Commission.

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“(C) Pursuant to the provisions of the act of March 4, 1929 (45 Stat. 1640), all charges for reimbursing the United States for the cost of administration of the Federal water power act have been and are hereby expressly waived.

“(D) The annual charges payable under this license may be readjusted at the end of 20 years after the beginning of operation under this license and at periods of not less than 10 years thereafter by mutual agreement between the Commission and the licensee, with the approval of the Secretary of the Interior. In case the licensee, the Commission, and the Secretary of the Interior can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in the United States arbitration act (U. S. C. Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in section 5 of regulation 14 of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development.

“(m) The licensee having submitted a claim of pre-license cost to January 31, 1929, of \$183,312.47 and the Solicitor of the Commission having recommended the rejection of items contained therein aggregating a total of \$85,088.76, the Commission and the licensee hereby mutually agree that the sum of \$98,223.71 shall be entered upon the fixed capital accounts of said project and included in the statement to be submitted to the Commission, in accordance with the provisions of article 32 of the license as representing the actual legitimate investment in said project up to and including January



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31, 1929; provided, however, that this agreement shall not deny or affect the licensee's right, within one year from and after the date of this license, to submit further evidence to the Commission or to any court having jurisdiction for the purpose of establishing the propriety of any part of said \$85,088.76.

“(n) The licensee agrees that it will enter into a contract with The Montana Power Company under which all electrical power or energy generated by the project covered by this license, except that delivered to or reserved for the United States pursuant to the provisions of the license, shall be delivered to or made available for said The Montana Power Company or its nominee upon the payment to the licensee of an annual amount approximately sufficient to meet the operating expenses and maintenance costs, taxes, accruals for depreciation and rentals (including the rental charges provided for by this license) and

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in addition an average return of eight per cent per annum on its actual legitimate investment in all facilities and property covered by this license and used in the generation and delivery of such power, as established under the provisions of the Federal water power act and the rules and regulations of the Commission issued in pursuance thereof. A duly certified copy of said power contract shall be filed with the Commission.

“(o) The licensee agrees that its securities shall be issued only (1) to The Montana Power Company upon condition that they shall be retained by said The Montana Power Company, it being understood that none of such securities shall be disposed of by said The Montana Power Company (except to a trustee or

trustees under one of its mortgages or deeds of trust as hereinafter provided) without the express approval of the Commission previously had and obtained, and/or (2) to a trustee or trustees under any mortgage or deed of trust securing the issuance of bonds or other securities of said The Montana Power Company, to be held subject to the provisions of such mortgage or deed of trust. Such securities shall be sold to The Montana Power Company for cash or its equivalent.

“(p) The licensee agrees that full and complete copies of rate schedules and all contracts of the licensee or of The Montana Power Company for management and supervision of its or their affairs, or for general construction, which involve the licensee or the project covered by this license, shall be filed with the Federal Power Commission promptly after execution. The licensee agrees to file annually with the Federal Power Commission copies of its annual reports and also copies of the Montana Power Company’s annual reports as rendered to The Montana Public Service Commission.

“The Commission further voted to reject the application of Walter H. Wheeler for preliminary permit for the five sites (project No. 868) without prejudice, however, to submission by him of an application for preliminary permit or license for the lower four sites, and voted to reject the application of Rocky Mountain Power Company for preliminary permit for the lower four sites (project No. 5).”

Witness my hand and the seal of the Federal Power Commission at Washington, D. C., this 23rd day of May, 1930.

/s/ F. E. BONNER  
*Executive Secretary.*

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THE FEDERAL POWER COMMISSION

License on Government Lands

Project No. 5

Montana

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ROCKY MOUNTAIN POWER COMPANY,

WHEREAS, by Act of Congress, approved June 10, 1920 (41 Stat., 1063) designated therein as "The Federal Water Power Act" and hereinafter called "the Act," the Federal Power Commission, hereinafter called "the Commission," is authorized and empowered, *inter alia*, to issue licenses for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam; and

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WHEREAS, by Act of Congress, approved March 7, 1928 (45 Stat., pp. 212, 213), the Commission was specifically authorized, in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use, for the development of power, of power sites on the Flathead Reservation and of water rights reserves or appropriated for the irrigation projects; and

WHEREAS, Rocky Mountain Power Company, hereinafter called "the licensee," a corporation organized and exist-

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ing under the laws of the State of Delaware and having its office and principal place of business in the City of Butte, in the State of Montana, has

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made application in due and proper form to the Commission for a license for a power project designated as Project No. 5 on the records of the Commission, and for authority to construct, maintain and operate, in Flathead River and Flathead Lake, in the vicinity of Polson, in the Counties of Flathead and Lake, State of Montana, certain project works, as hereinafter described, necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from and in navigable waters of the United States; and to occupy and use therefor certain public lands and reservations of the United States, as hereinafter described, together with all riparian rights appurtenant thereto which are necessary or useful for the purposes of the project; and water rights for power purposes reserved or appropriated for Indian irrigation projects; and

WHEREAS, the Licensee has submitted to the Commission satisfactory evidence of its compliance with the laws of the State of Montana as required by Section 9, subsection (b) of the Act, and the Commission is satisfied as to the ability of the Licensee to carry out the plans for said project as filed with said application; and

WHEREAS, notice of said application has been given and published by the Commission, as required by Section 4 of the Act; full opportunity has been given to all interested parties to be heard, and no application for said project, or in conflict therewith, has been filed by any State or municipality; and

WHEREAS, the maps, plans and specifications of said project and of said project works, as hereinafter described,

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have been approved by the Commission, and the plans of the dam and other structures affecting navigation have been approved by the Chief of Engineers and the Acting Secretary of War; and the terms set forth in this license are satisfactory to the Secretary

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of the Interior as required by the Act of March 7, 1928 (45 Stat., pp. 212, 213); and

WHEREAS, all charges for defraying the expense of administering the provisions of the Federal water power act were waived by the provisions of the Act of March 4, 1929 (45 Stat., 1640).

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WHEREAS, the Commission has found that said project, as hereinafter described, will be best adapted to a comprehensive scheme of improvement and utilization of said waterway for the purposes of navigation, of water power development and other beneficial public uses; and

WHEREAS, the Licensee, on the 20th day of May, 1930, pursuant to an authorization of its board of directors, a copy of the record thereof being hereto attached, accepted in writing all the terms and conditions of the Act and of this license;

Now, THEREFORE, the Commission hereby issues this license to the Licensee for the purpose of constructing, operating and maintaining certain project works necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from or in the Flathead River and Flathead Lake, navigable waters of the United States, and constituting a part of the project hereinafter described; said license, including the period thereof, being

subject to all the terms and conditions of the Act and of the rules and regulations of the Commission pursuant

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thereto as amended and made effective on the first day of May, 1928, as though fully set forth herein, which said rules and regulations are attached hereto and made a part hereof, and being subject also to the following express conditions and limitations, to wit:

Article 1. This license is issued for a period of fifty (50) years from the date hereof, and in consideration of such license and the benefits and advantages accruing thereunder to the Licensee it is expressly agreed by the Licensee that the entire project, project area and project works as hereinafter designated and described, whether or not located in, on or along said Flathead River and Lake or upon lands of the United States, shall be subject to all the terms and conditions of this license, including the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto and made a part of this license.

Article 2. The project covered by and subject to this license is designated as Flathead site No. 1, is located partly on public lands and reservations of the United States and consists of—

A. All lands constituting the project area and inclosed, or the location of which is shown, by the project boundary, and/or interests in such lands necessary or useful for the purposes of the project, whether such lands or interests therein are owned or held by the Licensee or by the United States; such project area and project boundary being more fully shown and described by certain exhibits which accompanied said application for license and which are designated and described as follows:

*Exhibit J:* Map in one sheet designated "Flathead Development General Map" (F.P.C. No. 5-1).

*Exhibit K:* Map in four sheets designated "Flathead Development Project Map" (F.P.C. No. 5-4, 5, 6, 7).

*Exhibits J & K:* Signed Rocky Mountain Power Company by F. M. Kerr, Vice President.

B. All project works consisting of a concrete dam in and across the Flathead River about four miles below the outlet of Flathead Lake;

A reservoir in said Flathead River and Lake;

Water conduits about 770 feet long, including an intake at the upper end of each such conduit;

A power house and appurtenant equipment;

such project works being more fully shown and described by certain exhibits which accompanied said application for license and which are designated and described as follows:

*Exhibits J & K:* Cited above.

*Exhibit L:* Map in two sheets designated "Flathead Development General Plan" (F.P.C. No. 5-8) and "Flathead Development Dam Analysis" (F.P.C. No. 5-9)

*Exhibit M:* Four typewritten sheets designated "General description of plant and equipment, Flathead Development."

*Exhibits L & M:* Signed Rocky Mountain Power Company by F. M. Kerr, Vice President.

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C. All other structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project and located upon the project area, including such portable property as may be used and useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as a part of the project works is approved or acquiesced in by the Commission; also all other rights, easements, or interests the ownership, use, occupancy or possession of which is necessary or appropriate in the maintenance and operation of the project or appurtenant to the project area.

Article 3. The maps, plans, specifications, and statements designated and described in Article 2 hereof as Exhibits J, K, L, and M, respectively, and approved by the Executive Secretary for the Commission in accordance with its authorization of May 19, 1930, are hereby made a part of this license, and no substantial change shall hereafter be made in said exhibits, or any of them, until such change shall have been approved by the Commission: Provided, however, that if the Licensee deems it necessary or desirable that said approved maps, plans, specifications and statements, or any of them, be changed there shall be submitted to the Commission for approval amended, supplemental, or additional maps, plans, specifications and statements covering the proposed changes, and upon approval by the Commission of such proposed changes such amended, supplemental or additional maps, plans, specifications and statements shall become a part of this license and shall supersede, in whole or in part, such map, plan, specification, or statement, or part thereof, theretofore made a part of this license as may be specified, respectively, in the order or endorsement of approval.



Article 4. Said project works shall be constructed in substantial conformity with the approved maps, plans and specifications thereof made a part of this license and designated and described in Articles 2 and 3 hereof or as changed in accordance with the provisions of said Article 3. Except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed under this license without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission shall direct. Minor changes in or divergence from such approved maps, plans, and specifications may be made in the course of construction, if such changes will not result in decrease in efficiency, in material increase in cost, or in impairment of the general scheme of development; but any such minor changes made without the prior approval of the Commission which in its judgment have produced or will produce any of such results shall be subject to such alteration as the Commission may direct.

Article 5. The work of construction under this license, whether or not conducted upon lands of the United States, shall be subject to the inspection and approval of the District Engineer, U. S. Engineer Office, Seattle, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall notify such representative of the date upon which work will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of construction for a period of more than one week, and of its resumption and completion.

Article 6. Subject to the provisions of Section 13 of the Act, the Licensee shall begin the construction of said project works within one year from the date of issuance hereof, shall thereafter, in good faith and with due diligence, prosecute such construction, and shall within three (3) years thereafter complete the installation of three units of not less than 150,000 horsepower aggregate capacity.

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Article 7. Upon the completion of the project works, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised maps, plans, specifications, and statements, in so far as necessary to show any divergence from or variations in the project area as finally located or in the project works as constructed when compared with the area shown and the works designated or described in this license or in the maps, plans, specifications, and statements approved by the Commission under the provisions of Article 3 hereof, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variations in or divergence from the approved maps, plans, specifications, and statements. Such revised maps, plans, specifications, and statements shall, if and when approved by the Commission, be made a part of this license and shall, to the extent and in the particulars set forth in the order or endorsement of approval, be substituted for the maps, plans, specifications and statements theretofore approved by the Commission under the provisions of Article 3 hereof. The maps finally approved by the Commission and made a part of this license under the provisions of Article 3 and/or 7 hereof shall show the project area to an adequate scale and the boundary thereof either by legal subdivisions, by metes and bounds survey, or by uniform offsets from center-line survey. Said project area shall include all lands without respect to ownership

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and whether or not the exact boundaries can be definitely fixed and determined, the use and occupancy of which are or will be valuable or serviceable in the maintenance and operation of the project; on which are located or to which are appurtenant the project works (other than portable property) and the rights, easements, or interests likewise valuable and serviceable; and the ownership or possession, or the right of use and occupancy, of which are subject to acquisition by the United States under the provisions of Section 14 of the Act. Said maps shall show the ownership of each parcel of land in said project area, and with respect to each parcel to which the Licensee has not the fee title, the character of the right of use and occupancy possessed by the Licensee together with the term of such right.

Article 8. For the purpose of determining the stage and flow of the stream or streams from which water is to be diverted for the operation of said project works and of the amount of water held in and drawn from storage, the Licensee shall install, as soon as practicable and thereafter maintain standard recording gages in Flathead Lake at the northern and southern ends, on Flathead River below the power plant, and on the principal streams tributary to Flathead Lake; and

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shall provide for the required readings of such gages and for the adequate rating of said station or stations. The Licensee shall also install and maintain standard meters adequate for the determination of the amount of electric energy generated by said project works. The number, character, and location of gages, meters or other measuring devices, and the method of operation thereof may be altered from time to time if necessary to secure adequate determinations, but such alteration shall not be made ex-

cept with the approval of the Commission or its authorized representative or upon the specific direction of the Commission. The installation of gages, the ratings of said stream or streams, and the determination of the flow thereof, shall be under the supervision of or in cooperation with the District Engineer of the United States Geological Survey having charge of stream gaging operations in the region of said project, and the Licensee shall advance to the said United States Geological Survey the amounts estimated to be necessary for such supervision or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, shall make return of such records annually, at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall be liable for all damages occasioned to the property of others, including lands allotted in severalty to the Indians, by the construction, maintenance or operation of said project works, or of the works appurtenant or accessory thereto, and in no event shall the United States be liable therefor; nor does this license guarantee the validity of any reservations contained in the patent to any allottee or other grantee of Indian lands, whether in trust or in fee.

Article 10. In the construction and maintenance of the project works herein specified, the Licensee shall place and maintain suitable structures to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic and endangering life on highways, streets, or railroads.

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Article 11. The Licensee shall allow officers and employees of the United States free and unrestricted access in, through and across the said project and project works in the performance of their official duties.

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Article 12. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands (except lands referred to in other provisions of this license), or other similar property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto constructed under the license. Arrangements to meet such liability either by compensation for such injury or destruction, reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 13. Timber upon public lands and reservations of the United States, to be used or destroyed in the construction of the project works, shall be paid for in accordance with the requirements and estimates of the Department concerned.

Article 14. The Licensee shall, before placing any transmission line into operation, make provision satisfactory to the Commission for avoiding inductive interference between such transmission line and any existing telephone line or lines of the United States, or with any such line or lines for which location has been made and specifications prepared but upon which construction has not begun at the time of erection of said transmission line. Such provisions may be applied either to the transmission line or to the telephone line or to both, as may be determined upon the basis of least cost. The Licensee hereby agrees to assent to such changes in the location or design of any of its transmission lines as may in the opinion of the

Commission be necessary or desirable in order to avoid inductive interference with any telephone line or lines of the United States hereafter constructed or proposed to be constructed, provided such changes are made at the expense of the United States.

Article 15. The Licensee shall clear of all trees, logs, brush, or other debris, up to elevation 2893, the margins of Flathead Lake and those portions of Flathead River which shall be used for reservoir purposes under this license, and shall dispose to the satisfaction of the Commission, or its designated representative, of all the brush and debris resulting from such clearing, together with all temporary structures and refuse left on public lands and reservations of the United States from the construction and maintenance of said project works. In addition, the Licensee shall cut and remove any trees or brush lying above elevation 2893 which may be killed due to the regulation of Flathead Lake for storage purposes.

Article 16. The Licensee shall permit the use of any reservoir included in the project for the temporary storage or for the transportation of logs, ties, poles, lumber, or other forest products: Provided, That the use of said reservoir by owners of such logs, ties, poles, lumber,

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or other forest products, shall be under such rules and regulations adopted by the Licensee as may be approved by the Secretary of Agriculture.

Article 17. The Licensee will interpose no objections to, and will in no way prevent, the use of water for domestic purposes by persons or corporations occupying public lands and reservations of the United States under permit along or near any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by this license.

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Article 18. The Licensee hereby recognizes the right of the United States to pump from the Flathead Lake or from Flathead River above Licensee's dam for all purposes of irrigation on the Flathead irrigation project or the lands of the Flathead Reservation whether included in the irrigation project or not, not more than 50,000 acre-feet of water after July 15th of any one year.

Article 19. The Licensee shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon request of officers of the Forest Service, or other agents of the United States, to prevent and suppress fires on or near the lands to be occupied under this license.

Article 20. Whenever the United States shall desire to construct, complete or improve navigation facilities the Licensee shall convey to the United States, free of cost, such of its lands and its rights of way and such right of passage through its dam or other structures, and permit such control of pools as may reasonably be required to construct, maintain, and operate such navigation facilities.

Article 21. The operations of the Licensee, in so far as they affect the use, storage, and discharge from storage of the water of Flathead Lake, shall at all times be controlled by such reasonable rules and regulations as the Secretary of War may prescribe in the interests of navigation, and as the Federal Power Commission may prescribe in the interests of flood control and of the fullest practicable utilization of the waters of Flathead River and Clark Fork for power, irrigation, and other beneficial public uses.

Article 22. The Licensee agrees that all rights acquired in connection with the project covered by this license and the use of water for the development of power shall be held subject to the rights which may be reasonably neces-



sary for the complete development of the irrigable land, the domestic water supply requirements, and the water-power possibilities in the watershed above the project works. The Licensee

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further agrees to waive objections to the subtraction of such water up to a maximum flow of 200 cubic feet per second, as may be authorized under either Federal or State authority for diversion out of the watershed above the project works.

Article 23. The Licensee may regulate Flathead Lake between elevations 2883 and 2893; provided, however, that the Commission retains the right, at any time prior to the beginning of commercial operation of the project, to define limits of such regulation between elevations 2880 and 2893 in such manner as will make not less than 1,100,000 acre-feet of storage capacity available to the Licensee, it being expressly understood that Licensee shall not be restricted to less than ten feet between the minimum and maximum elevations within which to carry on its regulation of Flathead Lake. It is expressly understood that variation by the Commission of any limits of regulation which may be fixed as aforesaid, shall not affect the rentals provided for in Article 30 hereof. It is expressly understood that if and when water is pumped from Flathead Lake or from Flathead River above Licensee's dam after July 15th in any year for purposes of irrigation as provided in Article 18 hereof, the Licensee shall be permitted, in the months of January, February and March of the next succeeding year, to regulate Flathead Lake, below the minimum elevation which may be fixed as aforesaid, to the extent necessary to enable it to recover the amount of water so pumped for irrigation purposes. Said elevations are in feet above mean sea level as determined by reference to a certain U. S. Geological Survey bench mark, elevation 2910.882



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feet, stamped "2900 GN," as now located and established at Somers, Flathead County, or to such other bench marks as may be established by the U. S. Geological Survey having the same datum. As a basis of determination of the aforesaid storage limits, the Licensee shall complete the mapping of lands bordering Flathead Lake and River and of the lake bed between elevations 2878 and 2900 uniform with the maps already completed by the Geological Survey at the north end of the lake, and shall continue to finance the collection of records of ground water elevations in the area at the head of Flathead Lake, and the study and interpretation of such records. The Licensee also agrees to perform such channel excavation and other work as may reasonably be required by the Commission for the purpose of flood control to the end that the normal flood levels of Flathead Lake shall not be increased by reason of the installation of the project works, and for the purpose of full utilization of storage and navigation.

Article 24. In consideration of the use to be made of the partially completed Newell tunnel, the Licensee shall pay into the treasury of the United States the sum of one hundred and one thousand six hundred and eighty-five dollars and eleven cents (\$101,685.11), such payment

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to be made within nine (9) months from and after the date of this license and to be a part of and included in the Licensee's net investment in the project.

Article 25. For the purpose of preventing the entrance of fish into the turbines of the power plant, the Licensee shall install and maintain such fish stops or other equipment as may reasonably be prescribed by the Secretary of Commerce.

Article 26. Coincident with the beginning of commercial operation of the project works and thereafter throughout

the remainder of the term of the license, Licensee shall make available, at the project boundary at or near the Licensee's generating station, and the United States, for and on behalf of the Flathead irrigation project or the Flathead irrigation district, may take and, having taken, shall pay for, at the price of one mill per kilowatt hour: (1) electrical energy in an amount not exceeding 5,000 horsepower of demand to be used exclusively for pumping water for irrigation; and (2) electrical energy in an amount not exceeding 5,000 horsepower of demand for all project and farm uses and for resale. Such deliveries shall be made at such standard voltage as may be selected by the Commission. The Licensee shall also make available, at the voltage of the line from which service is taken, either at the project boundary at or near the Licensee's generating station or at some more convenient place on the project to be agreed upon, and the United States, for and on behalf of the Flathead irrigation project or the Flathead irrigation district, may take and, having taken, shall pay for, at the price of two and one-half mills per kilowatt hour, additional electrical energy in an amount not exceeding 5,000 horsepower of demand for all project and farm uses and for resale.

Article 27. The Licensee shall, during the period of construction, deliver at line voltage and at a point to be agreed upon on the line or lines which it will construct to supply power for construction purposes, power for farm and project purposes on the Flathead irrigation project or the Flathead irrigation district in quantities required by the United States for said purposes up to a maximum demand of 500 horsepower, at the price of 2½ mills per kilowatt hour.

Article 28. The United States reserves to itself or to the Flathead irrigation project management the exclusive right to sell power within the boundaries of the Flathead Indian

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Reservation, to the extent of 10,000 horsepower to be delivered for use and/or sale as provided in Article 26 hereof.

Article 29. The Licensee shall pay to the United States reasonable annual charges for recompensing it for the use, occupancy and enjoyment of public and reserved lands (not including Indian tribal lands) or other property hereinbefore described. The payment by the Licensee of

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such annual charges for any calendar year shall be made to the United States at the end of the year, or within thirty days thereafter, upon bills rendered or approved by the Commission. Such charges shall be determined in accordance with the provisions of Regulation 14 of said rules and regulations of the Commission, and for the purposes of such determination the prime power capacity of the project shall be taken as 80,000 horsepower.

Article 30.

(A) The Licensee shall pay into the United States Treasury as compensation for the use, in connection with this license, of the Flathead Indian tribal lands annual charges computed as follows:

(1) A charge at the rate of One Thousand Dollars (\$1,000) per calendar month beginning with the month in which the license is issued and extending to and including the month in which the project is placed in commercial operation. For the purpose of the payments under this article, the beginning of commercial operation shall be considered as the time when one of the Licensee's generating units shall have been installed, tested, and demonstrated to be in suitable condition to produce electric energy for commercial purposes with a reasonable degree of reliability.

(2) A charge at the rate of Five Thousand Dollars (\$5,000) per month beginning with the calendar month next succeeding the date on which the project is placed in commercial operation and extending to the end of the calendar year in which such commercial operation shall commence.

(3) For each full calendar year from and after the 1st of January next following the date on which the first unit is placed in commercial operation, annual charges will be as follows:

For the first two years .....	\$ 60,000 per year
For the third year .....	75,000
For the fourth year .....	100,000
For the fifth year .....	125,000
For the next five years .....	150,000 per year
For the next five years .....	160,000 " "
For the next five years and/or until readjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of paragraph (D) of this Article 30 .....	175,000 " "

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(B) Payments shall be made for each calendar year within 30 days after the close thereof on bills rendered by the Commission.

(C) Pursuant to the provisions of the act of March 4, 1929 (45 Stat., 1640), all charges for reimbursing the United States for the cost of administration of the Federal water power act have been and are hereby expressly waived.

(D) The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operation under this license and at periods

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of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission, and the Secretary of the Interior can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in "The United States Arbitration Act," (U.S.C., Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development.

Article 31. The Licensee having submitted a claim of prelicense cost to January 31, 1929, of \$183,312.47 and the Solicitor of the Commission having recommended the rejection of items contained therein aggregating a total of \$85,088.76, the Commission and the Licensee hereby mutually agree that the sum of \$98,223.71 shall be entered upon the fixed capital accounts of said project and included in the statement to be submitted to the Commission, in accordance with the provisions of Article 32 hereof as representing the actual legitimate investment in said project up to and including January 31, 1929; provided, however, that this agreement shall not deny or affect the Licensee's right, within one (1) year from and after the date of this license, to submit further evidence to the Commission or to any court having jurisdiction for the purpose of establishing the propriety of any part of said \$85,088.76.

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Article 32. Upon the completion of the construction of said project or of each of the separable parts thereof for which dates of completion are specified in Article 6 hereof, or of any addition to or betterment of said project, the Licensee shall file with the Commission a statement under

oath in duplicate showing the actual legitimate cost of construction thereof and the price paid for water rights, lands, or interest in lands appurtenant to such construction as required by Regulation 20, Section 2, of said rules and regulations of the Commission. Any such statement shall include all proper and legitimate costs, whether incurred prior to issuance of license or on and after such date; and the Licensee shall, if requested by the Commission, show separately on any such statement, or on a special report or reports, the items and amounts of cost incurred prior to date of issuance of license, with such other details as the Commission may require. Each and every item of cost included in any such statement shall be supported by proper voucher or other evidence; and any such voucher or evidence or certified copy thereof, in support of any item properly includible in said cost shall become a part of the permanent records of said project and shall be kept and retained by the Licensee in the manner required by the Commission. Any statement or report submitted to the Commission under the provisions of this article shall be subject to the provisions of Section 6 of said Regulation 20.

Article 33. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of such reservoir or other improvement for such part of the annual charges for interest, maintenance and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by the Licensee shall be determined from time to time by the Commission. Whenever such reservoir or other improvement is constructed by the United States the Licensee shall pay similar charges into the Treasury of the United States upon bills rendered by the Commission.

Article 34. After the first twenty years of operation of said project under this license, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of the Licensee in said project, all as defined in and determined by the provisions of regulation 17 of said rules and regulations of the Commission, the Licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return shall, subject to the proviso of paragraph A, section 3 of said regulation, be one and one-half ( $1\frac{1}{2}$ ) times the weighted average annual interest rate payable on the par value of the bona fide interest-bearing debt of the Licensee actually outstanding, in whole or in part, on account of project property at the beginning of the period of amortization and of each calendar year thereafter; such weighted average annual interest rate being determined as provided in paragraphs B and C of section 3 of said regulation 17: Provided, That, if at the beginning of the period of amortization or of any calendar year thereafter, the outstanding interest-bearing debt of the Licensee on account of the project or projects under license, together with any other works or property operated in connection therewith, is less than 25 per cent of the actual, legitimate investment of the Licensee in said project or projects, then and in such event for the calendar year next following the specified rate of return shall be two (2) times the legal rate of interest in the State in which the project or major part thereof is located.

Subject to the provisions of section 6 of said regulation, the following proportions of such surplus earnings shall be paid into and held in such amortization reserves: Of



all surplus earnings up to and including 2 per cent upon the actual, legitimate investment, 30 per cent thereof shall be so paid; of all surplus earnings in excess of 2 per cent and not in excess of 4 per cent upon such investment, 50 per cent thereof shall be so paid; of all surplus earnings in excess of 4 per cent and not in excess of 6 per cent, 70 per cent thereof shall be so paid, and of all surplus earnings in excess of 6 per cent, 90 per cent thereof shall be so paid: Provided, That if at the end of any calendar year of the amortization period the Commission shall find that the accumulated earnings of the Licensee during the period of operation, including the first twenty (20) years thereof, have not yielded a fair return upon the actual, legitimate investment in the project or projects under license, the proportion of such surplus earnings for such calendar year and for succeeding calendar years to be paid into such amortization reserves shall be ten (10) per cent thereof until such time as the accumulated earnings of the Licensee represent, in the judgment of the Commission, a fair return upon such investment for such period of operation.

Article 35. No lease of said project or part thereof whereby the lessee is granted the exclusive occupancy, possession or use of project works for purposes of generating, transmitting or distributing power shall be made without the prior written approval of the Commission; and the Commission may, if in its judgment the situation warrants, require that all the conditions of this license, of the Act, and of said rules and regulations of the

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Commission shall be applicable to such lease and to such property so leased to the same extent as if the lessee were the Licensee hereunder: Provided, That the provisions of this article shall not apply to parts of the project or



project works which may be used by another jointly with the Licensee under a contract or agreement whereby the Licensee retains the occupancy, possession, and control of the property so used and receives adequate consideration for such joint use, or to leases of land while not required for purposes of generating, transmitting, or distributing power, or to buildings or other property not built or used for said purposes, or to minor parts of the project or project works the leasing of which will not interfere with the usefulness or efficient operation of the project by the Licensee for said purposes. The Licensee agrees that it will continue its separate corporate existence under the regulations of the Federal Power Commission, and that it will not enter into any merger with any other corporation or individual without the approval of the Federal Power Commission, previously obtained.

Article 36. The Licensee agrees that it will enter into a contract with The Montana Power Company under which all electrical power or energy generated by the project covered by this license, except that delivered to or reserved for the United States pursuant to the provisions of this license, shall be delivered to or made available for said The Montana Power Company or its nominee upon the payment to the Licensee of an annual amount approximately sufficient to meet the operating expenses and maintenance costs, taxes, accruals for depreciation and rentals (including the rental charges provided for by this license) and in addition an average return of eight per cent per annum on its actual legitimate investment in all facilities and property covered by this license and used in the generation and delivery of such power, as established under the provisions of the Federal water power act and the rules and regulations of the Commission issued in pursuance thereof. A duly certified copy of said power contract shall be filed with the Commission.

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Article 37. It is hereby understood and agreed that the Licensee, its successors and assigns will, during the period of this license, retain the possession of all project property covered by this license as issued or as hereafter amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and that none of such properties valuable and serviceable to the project and to the development, transmission, and distribution of power therefrom will be voluntarily sold, transferred, abandoned, or otherwise disposed of without the approval of the Commission: Provided, That a mortgage or trust deed or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article. The Licensee further agrees, on behalf of itself, its successors and assigns, that, in the event said project is taken over by the United States upon the termination of this license, as provided in Section 14 of the Act, or is transferred to a new Licensee under the provisions of Section 15 of the Act, it will be responsible for and will make good any defect of title to or of right of user in any such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge or will assume responsibility for payment and discharge of all liens or incumbrances upon said project or project property created by said Licensee or created or incurred after the issuance of this license: Provided, That the provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear, or to require the Licensee for the purpose of transferring the project to the United States or

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to a new Licensee to acquire any different title or right of user in any such project property than was necessary to acquire for its own purposes as Licensee.

Article 38. The Licensee shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is

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rendered or the rate charged; and in case of the development, transmission, distribution, sale or use of power in public service by the Licensee or by its customers engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by the Licensee or by its customers engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of this license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: Provided, That the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this Article as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

Article 39. The Licensee agrees that its securities shall be issued only (1) to The Montana Power Company upon condition that they shall be retained by said The Montana Power Company, it being understood that none of such

securities shall be disposed of by said The Montana Power Company (except to a trustee or trustees under one of its mortgages or deeds of trust as hereinafter provided) without the express approval of the Commission previously had and obtained, and/or (2) to a trustee or trustees under any mortgage or deed of trust securing the issuance of bonds or other securities of said The Montana Power Company, to be held subject to the provisions of such mortgage or deed of trust. Such securities shall be sold to The Montana Power Company for cash or its equivalent.

Article 40. The Licensee agrees that full and complete copies of rate schedules and all contracts of the Licensee or of The Montana Power Company for management and supervision of its or their affairs, or for general construction, which involve the Licensee or the project covered by this license, shall be filed with the Federal Power Commission promptly after execution. The Licensee agrees to file annually with the Federal Power Commission copies of its annual reports and also copies of The Montana Power Company's annual reports as rendered to The Montana Public Service Commission.

Article 41. With the written consent of the Licensee, the Commission may by order made under its seal, and after the public notice required by Section 6 of the Act, modify, alter, enlarge or omit, in so far as authorized by law, any one or more of the conditions or provisions of this license; provided, however, that any such change in the terms of this license that may affect the interests of the Flathead Indians shall also be subject to approval by the Secretary of the Interior.

Article 42. The enumeration herein of any rights reserved to the United States or to any State or municipality under the Act, or of any requirements of the Act, or of said rules and regulations of the Com-

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mission shall not be construed in any degree as impairing any other rights so reserved by the Act or as limiting the force of any other requirement of said Act or of said regulations.

IN WITNESS WHEREOF, the Federal Power Commission has caused its name and seal to be hereto signed and affixed by its Executive Secretary, F. E. Bonner, this 23rd day of May, 1930, pursuant to authority given at its meeting of May 19, 1930, a certified copy of the record thereof being hereto attached.

FEDERAL POWER COMMISSION

By F. E. BONNER  
*Executive Secretary.*

APPROVED May 23, 1930.

RAYMOND WILBUR  
*Secretary of the Interior*

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IN TESTIMONY OF ACCEPTANCE of all the terms and conditions of the Federal Water Power Act of June 10, 1920, and of the further conditions imposed in the foregoing license, the Licensee, this 20th day of May, 1930, has caused its name and corporate seal to be hereto signed and affixed by JOHN D. RYAN its President pursuant to a resolution of its board of directors, passed on the 20th day of May, 1930, a certified copy of the record thereof being hereto attached.

ROCKY MOUNTAIN POWER COMPANY,

By JOHN D. RYAN  
*President.*

ATTEST:

J. F. DENISON  
*Secretary.*

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In consideration of the benefits to accrue to The Montana Power Company, a corporation organized and existing under the laws of the State of New Jersey, from the operation of the project which is the subject of the foregoing license, said The Montana Power Company, hereunto duly authorized by resolution of its Board of Directors, a certified copy of which is hereto attached, hereby guarantees the full performance by Rocky Mountain Power Company, licensee thereunder, of all the terms and conditions of Article 6 of said license relating to the commencement of construction of the project works, to the due prosecution of such construction, and to the completion of the installation of three units of not less than 150,000 horsepower aggregate capacity, all as provided in said license. The undersigned Company further agrees that it will enter into a power contract with said licensee as provided for in Article 36 of said license.

THE MONTANA POWER COMPANY

By FRANK SILLEMAN, JR.  
*Vice President*

ATTEST:

J. F. DENISON  
*Secretary.*

Approved and accepted this 23rd day of May, 1930.

FEDERAL POWER COMMISSION

By F. E. BONNER  
*Executive Secretary.*

Approved May 23, 1930.

RAYMOND WILBUR  
*Secretary of the Interior.*

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[Received July 17, 1936]

Instrument No. 2

FEDERAL POWER COMMISSION

AMENDMENT NO. 2 OF LICENSE

PROJECT NO. 5, MONTANA

ROCKY MOUNTAIN POWER COMPANY

WHEREAS, under authority of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063) as amended, the Federal Power Commission, hereinafter called "the Commission," on May 23, 1930, issued to Rocky Mountain Power Company, a Delaware corporation with office and principal place of business at Butte, Montana, called "the Licensee," a license for a power project on Flathead Indian Reservation, Montana, designated on the records of the Commission as project No. 5, which license as amended May 22, 1934, provided that construction must be completed by August 24, 1934; and

WHEREAS, the Licensee applied on February 16, 1935, for extension of time to May 23, 1938, for completion of construction of the initial installation, but due to failure to obtain the approval of the Secretary of the Interior, required by the Act of March 7, 1928 (45 Stat. 212), said application was denied by the Commission on April 1, 1935, and the matter was referred to the Attorney General for appropriate action; and

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WHEREAS, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, incorporated under the act of June 18, 1934 (48 Stat. 984), as amended, the Rocky Mountain Power Company, and The Montana Power Company have executed an agreement and supplementary agreement in writing whereby the aforesaid tribe waives all accrued claims, if any, to damages which it may have by reason of any past violation of the terms of the original license, and has consented to the amendment of the license hereinafter set forth, including the annual charges therein provided for, and whereby the Rocky

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Mountain Power Company and The Montana Power Company, in consideration of such waiver and consent, stipulate for the payment of liquidated damages in the event of failure to complete the first unit of the project, and further stipulate that preference shall be given to members of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in the hiring of employees for the work of construction and operation of the power project under this license, all as set forth in the agreement and supplementary agreement; and

WHEREAS, the Secretary of the Interior by letter dated May 13, 1936, recommended approval of an amendment conforming to said agreement, subject to the execution of said agreement by the parties thereto; and the Secretary thereafter on June 18, 1936, recommended favorable consideration of an amendment conforming to said agreement and supplementary agreement and advised that he would approve such an amendment in the event the aforesaid tribe consented to the supplementary agreement; and the Secretary thereafter, being advised of said execution of the agreement and of said consent to the supplementary agree-



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ment and of the consent of said tribe to the amendment of the license as hereinafter set forth including the annual charges therein provided for, approved said amendment, all as evidenced by his approval hereinafter of this instrument, but without limiting the effect of such approval; and

WHEREAS, an amendment covering certain changes in the design of the dam and spillway, the number and size of generating units, and other changes in plans authorized by the Commission on February 6, 1933, failed to secure the approval of the Secretary of the Interior; and

WHEREAS, upon due consideration of the terms of said agreement, and

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supplementary agreement, the recommendation of the Secretary of the Interior, and the proposed changes in plans, the Commission found at its meeting on June 23, 1936:

(a) That an amendment to the license for project No. 5 to extend the time for completion of the initial installation to May 23, 1939, is desirable and justified in the public interest, if approved by the Secretary of the Interior;

(b) That public notice of the application of the Rocky Mountain Power Company for extension of time for completing the project has been given;

(c) That payments in accordance with the schedule proposed in Exhibit A of aforesaid agreement would constitute a reasonable annual charge for the use of the tribal lands involved, if approved by the Indian tribe having jurisdiction over such lands;

(d) That the further special conditions included in Exhibit A of said agreement in reference to compensation

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for additional cost of pumping equipment and power for irrigation pumping and other purposes, made necessary by the failure of the Licensee to complete construction and raise the water level of Flathead Lake at the date set in the original license, are deemed necessary by the Secretary of the Interior to adequately protect the interests of the Indians of the Flathead Reservation and the interests of the United States;

(e) That the Commission's authorization of amendment on February 6, 1933, is no longer applicable as a whole and should be rescinded, but that the proposed changes in initial installation, type of dam, number and size of penstock tunnels and generating units, and type and number of trans-

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formers included in said authorization are desirable and justified in the public interest and should be reauthorized; and

WHEREAS, the Commission thereupon ordered that the amended plans designated as Exhibit L, sheets 1 and 2, and amended Exhibit M, filed by the Licensee on May 18, 1931, be approved and substituted for the original license exhibits bearing the same designation; and that the license be further amended as hereinafter set forth:

Now, THEREFORE, the license issued to the Licensee as aforesaid is hereby amended as follows upon the express condition, however, that such amendment shall not operate to alter or amend said license in any other respect than as herein specified, and shall not in any way constitute a waiver of any other part, provision, or condition of said license.

PARAGRAPH I. Article 2 of said license is amended by eliminating therefrom Exhibit L, plans in two sheets

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(F.P.C. No. 5-8 and 5-9), and Exhibit M, four typewritten sheets, and substituting therefor the following exhibits:

*Exhibit L:* Sheet 1, designated "Flathead Project No. 5, General Layout" (F-38519, F.P.C. No. 5-10); and Sheet 2, designated "Flathead Project No. 5, Power House" (F-38520, F.P.C. No. 5-11); signed on April 30, 1931, Rocky Mountain Power Company by F. M. Kerr, Vice President;

*Exhibit M:* Five typewritten sheets designated "General Description of Plant and Equipment, Flathead Development;" signed on April 30, 1931, Rocky Mountain Power Company by F. M. Kerr, Vice President.

PARAGRAPH II. Article 4 of the license is amended by adding the following sentence:

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"The Licensee shall submit to the Commission final detail plans of the arch dam and obtain approval thereof before placing any concrete in the dam; provided, however, that nothing herein contained shall be construed as modifying or in any way affecting the provisions of Article 6 as amended, with respect to the time of completion of construction."

PARAGRAPH III. Article 6 of the license is amended to read as follows:

"The Licensee shall renew construction operations of the said project works within 30 days from the effective date of this amendment and shall thereafter, in good faith and with due diligence, prosecute such construction operations and shall on or before May 23, 1939, complete the installation of one unit of not less

than 77,000 horsepower capacity; and, subject to the provisions of Section 13 of the Federal Power Act, shall install an additional unit of 77,000 horsepower capacity. Subject to the provisions of existing law, in the event that the Licensee shall fail to renew construction operations within the 30 days after the effective date of this amendment, it is mutually agreed that this license and all rights of the Licensee thereunder, shall terminate, and that all property of the Rocky Mountain Power Company and all property of The Montana Power Company located within the project boundary shall forthwith become the property of the United States in trust for the aforesaid tribe; and that all claims to compensation for such property shall be discharged forthwith in consideration of the release of the Licensee and The Montana Power Company from further obligations under the amended license and the guaranty of said The Montana Power Company: *Provided, however,* that in such event claims for annual charges accruing on or before the date of such termination of this license shall not be waived thereby.

“The Spillway crest gates shall not be installed until such time subsequent to the date of original operation of the plant as may be determined by the Commission or by the Licensee with the approval of the Commission, in conformity with the provisions of Section 13 of the Federal Power Act. In making the installation of the first 77,000 horsepower generating unit, the licensee shall have the right to postpone the construction of the crest gates on the dam, together with their intermediate piers and supports as well as the tunnel for unit No. 2, until such time as the construction of those items shall become necessary under the provisions of Section 13 of the Federal Power Act.

"The Licensee and The Montana Power Company simultaneously with the taking effect of this amendment to the license have entered into an agreement with the Confederated Salish and Kootenai Tribes of the Flathead Reservation providing among other things for liquidated damages to the tribe for failure to complete the first unit of 77,000 horsepower capacity under the terms and conditions set forth in said agreement, which agreement shall be controlling upon the question of damages in the event of default as therein provided.

"The time for the completion of both the first unit and the second unit shall be extended if construction operations are delayed by acts of God, strikes, lock-outs, or other industrial disturbances, acts of public enemies, wars, blockades, earthquakes, fires, explosions, storms, floods, washouts, failure or inability to obtain materials or supplies, transportation delays or difficulties, arrests and restraint of rulers and people, civil disturbances, breakage of or accident to machinery or equipment, all not within the control of the licensee, or any other act or thing, whether or not of the kind herein enumerated or otherwise, not within the control of the licensee, the period of such extension to be the period of delay caused by any of the aforesaid acts, things, or contingencies, as fixed by the Commission upon application duly made therefore and after proper showing.

"It is further understood that so long as the licensee pays the liquidated damages provided by the above-mentioned agreement between the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the licensee, and The Montana Power Company, there

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shall be no revocation of the license for failure to complete the first unit within the time specified and no revocation of the license shall be predicated upon failure to complete construction during the period of payment of liquidated damages."

PARAGRAPH IV. Article 18 of the license is amended to read as follows:

"The Licensee hereby recognizes the right of the United States to pump from Flathead Lake or from Flathead River above Licensee's dam, for all purposes of irrigation on the Flathead irrigation project or the lands of the Flathead Reservation whether included in the irrigation project or not, but that not more than 50,000 acre-feet of water shall be pumped therefrom after July 15 within any one calendar year. The Licensee hereby undertakes to pay \$50,000 or so much thereof as may be

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necessary to the United States for the Flathead irrigation project to defray the additional cost (if and when actually incurred) of installation, readjustment, operation and maintenance of pumping equipment for irrigation purposes made necessary by the failure of the Licensee to complete construction and raise the water level of Flathead Lake at the date set in the original license."

PARAGRAPH V. The first sentence of Article 23 is amended to read as follows:

"The Licensee may regulate Flathead Lake between elevations 2883 and 2893; provided, however, that the Commission retains the right, at any time prior to the beginning of commercial operation of the project,

(9050)

to define limits of such regulation between elevations 2880 and 2893 in such manner as will make not less than 1,100,000 acre-feet of storage capacity available to the Licensee, it being expressly understood that Licensee shall not be restricted to less than 10 feet between the minimum and maximum elevations within which to carry on its regulation of Flathead Lake, and that the approval of spillway gates having a crest elevation of 2896 does not authorize any higher controlled water level than 2893; and provided further that from and after June 1, 1939, and until final installation of the gates at the crest of the dam has been completed in accordance with the provisions of Article 6 as amended, the Licensee shall furnish without cost or charge to the United States for the Flathead irrigation project any additional power that may be required to pump water for purposes of the Flathead irrigation project, by reason of the lowering of the water level from the original agreed minimum level of 2883 feet."

PARAGRAPH VI. Article 26 of the license is amended by substituting for the opening words, "Coincident with the beginning of commercial operation of the project works," the words, "On June 1, 1939, or on such earlier date as the project works may be placed in commercial operation," and by adding to said article the following paragraph:

"During the period starting June 1, 1934, and ending June 1, 1939, the licensee shall make available to the United States at the project boundary near licensee's generating station, 5,000 horsepower for the use of the

9051

Flathead irrigation project or the Flathead irrigation district, at a price of 1 mill per kilowatt hour, and the licensee shall allow credit to the United States

for and on behalf of the Flathead irrigation project for all sums paid in excess of this rate for energy used by the said project from and after June 1, 1934; provided nothing herein shall prevent The Montana Power Company from asserting any valid offsetting claim or claims for amounts due or hereafter to become due from the United States or the Flathead irrigation project by reason of services rendered or facilities afforded in connection with the power referred to.

"The licensee shall install, as a part of the initial development, two three-phase transformers, each with a capacity of at least 3,750 kilovolt-amperes, for the delivery of electrical energy in accordance with the provisions hereof, and shall install a third transformer at such time as the Commission may direct."

PARAGRAPH VII. Article 30, paragraph (A) of the license is amended to read as follows:

"(A) The Licensee shall pay into the United States Treasury, as compensation for the use in connection with this license, of the Flathead Indian tribal lands, annual charges computed as follows: During the period from May 23, 1930, to January 1, 1955, and in accordance with the following modified schedule of annual charges, the licensee shall pay as charges the sum due under the license as originally executed, to wit, \$2,929,000, together with interest at the rate of 4 per cent per annum on all payments deferred under this modified schedule, such interest amounting to an additional \$168,800, which sum shall be paid in annual



(9051)

installments as it accrues consistently with the following schedule of interest payments:

*Schedule of Interest Payments*

Year	Interest	Year	Interest
1934	1,120	1945	11,600
1935	3,040	1946	10,000
1936	4,960	1947	8,400
1937	7,480	1948	6,800
1938	11,000	1949	5,200
1939	14,400	1950	4,200
1940	16,000	1951	3,200
1941	16,000	1952	2,200
1942	14,800	1953	1,200
1943	13,600	1954	1,200
1944	12,400		

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(Schedule of Interest Payments—cont.)

Total ..... \$168,800

It is agreed that should the said Licensee or said The Montana Power Company pay the whole or any part of the deferred charges in advance of the due date provided for under the amended schedule herein, interest shall be paid only in so far as it actually has accrued.

*Schedule of Annual Charges*

(1) A charge at the rate of \$1,000 per calendar month beginning with the month in which the license was issued and extending to and including the month of May 1939.

(2) A charge at the rate of \$5,000 per month beginning with the calendar month of June 1939 and extending to the end of the calendar year 1939.

(9052)

(3) For each full calendar year from and after the first of January 1940, annual charges will be as follows:

	Per Year
For the year 1940 .....	\$110,000
For the year 1941 .....	150,000
For the years 1942 to 1945, inclusive ...	180,000
For the years 1946 to 1953, " ...	200,000
For the year 1954 .....	205,000
Thereafter, until adjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of paragraph (D) of this Article 30 .....	\$175,000''

PARAGRAPH VIII. Article 32 of the license is amended by adding the following paragraph:

"Upon resumption of construction under the terms and conditions of articles 4 and 6 as amended, the Licensee shall file with the Commission under oath to the extent not already filed, a statement, in triplicate, setting forth separately and in detail (1) all expenditures made on account of said project and all charges included or proposed to be included in the cost thereof applicable to the period prior to July 1, 1931, and (2) all expenditures made on account of said project, all charges made in the Licensee's accounts, and all obligations or liabilities incurred by said Licensee, whether entered in its accounts or not, applicable to the period from and including July 1, 1931, up to the date of resumption of construction work, which it is proposed by the Licensee to charge to and include in the cost of said project."

PARAGRAPH IX. A new article is added to the license to be designated Article 43 and to read as follows:

"Any and all defaults in the performance of any of the terms and conditions of the license prior to the granting of this amendment are waived. If for any cause beyond the control of the licensee or The Montana Power Company the power to be developed at the project is not produced or cannot be marketed, then and in such event, if the licensee or The Montana Power Company has paid or shall pay to the Confederated Salish and Kootenai Tribes of the Flathead Reservation a sum in liquidated damages, which together with all other amounts of liquidated damages paid to said tribe under the above-mentioned agreement between said tribe, licensee and The Montana Power Company, will aggregate the sum of \$1,000,000, then licensee at its option, after performing all acts required to be performed and making all payments required to be made by it to the date of surrender, under the license as amended, shall be entitled to surrender this license as amended and terminate all obligations thereunder and under the guaranty of The Montana Power Company, and upon any such surrender all property of the Rocky Mountain Power Company and of The Montana Power Company located within the project boundary shall forthwith become the property of the United States, in trust for the aforesaid tribe; but prior to any such surrender nothing herein shall affect the right of the United States to a revocation of the license for the reasons and subject to the terms and conditions set forth in Sections 13 and 26 of the Federal Power Act."

(9054)

PARAGRAPH X. The guarantee signed by The Montana Power Company and attached to the original license is amended to read as follows:

"In consideration of the benefits to accrue to The Montana Power Company, a corporation organized and existing under the laws of the State of New Jersey, from the operation of the project which is the subject of the foregoing license, said The Montana Power Company, hereunto duly authorized by resolution of its board of directors, a certified copy of which is hereto attached, hereby guarantees the full performance, during the continuance of said license as amended, by Rocky Mountain Power Company, licensee thereunder, of all the terms and conditions thereof, including the payment of annual charges therein provided. The undersigned company further agrees that it will enter into a power contract with said licensee as provided for in article 36 of said license."

9054

IN WITNESS WHEREOF, the Federal Power Commission has caused its name and seal to be hereto signed and affixed by Frank R. McNinch, its Chairman, this 17th day of July, 1936, pursuant to an order of the Commission dated June 23, 1936.

FEDERAL POWER COMMISSION

By FRANK R. MCNINCH  
*Chairman.*

Approved July 16, 1936.

HAROLD ICKES  
*Secretary of the Interior.*

(Executed in triplicate)

ECB:hlw  
6/25/36

(9055)

9055

IN TESTIMONY OF ACCEPTANCE of all the terms and conditions of the foregoing instrument and of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended, the Licensee, this 30th day of June, 1936, has caused these presents to be signed in its corporate name by F. M. Kerr, its President, and its corporate seal to be hereunto affixed and attested by S. P. Hogan, its Secretary, pursuant to a resolution of its Board of Directors passed on the 30th day of June, 1936, a certified copy of the record thereof being hereto attached.

ROCKY MOUNTAIN POWER COMPANY

By F. M. KERR  
*President.*

Attest:

S. P. HOGAN  
*Secretary.*

(Executed in triplicate)

. . . . .

9058

In consideration of the benefits to accrue to THE MONTANA POWER COMPANY, a corporation organized and existing under the laws of the State of New Jersey, from the operation of the project which is the subject of the foregoing license, said THE MONTANA POWER COMPANY, hereunto duly authorized by resolution of its board of directors, a certified copy of which is hereto attached, hereby guarantees the full performance, during the continuance of said license as amended, by ROCKY MOUNTAIN POWER COMPANY, licensee thereunder, of all the terms and conditions thereof, including the payment of annual charges therein provided. The undersigned company further agrees that it will enter

(9058)

into a power contract with said Licensee as provided for in article 36 of said license.

IN TESTIMONY WHEREOF, said corporation has, this 30th day of June, 1936, caused these presents to be signed in its corporate name by F. M. Kerr, its President, and its corporate seal to be hereunto affixed and attested by S. P. Hogan, its Secretary.

THE MONTANA POWER COMPANY

By F. M. KERR  
*President.*

ATTEST:

S. P. HOGAN  
*Secretary.*

Approved July 16, 1936.

HAROLD ICKES  
*Secretary of the Interior.*

Approved and accepted this 17th day of July, 1936.

FEDERAL POWER COMMISSION  
By FRANK R. MCNINCH  
*Chairman.*

• • • • •

(9074)

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FEDERAL POWER COMMISSION

Commissioners: Frank R. McNinch, Chairman, Basil Manly, Vice Chairman, Herbert J. Drane, Claude L. Draper, Clyde L. Seavey

Project No. 5

APPLICATION OF  
ROCKY MOUNTAIN POWER COMPANY

**Authorization for amendment of major license to include  
supplementary plans**

Upon the application of Rocky Mountain Power Company, licensee under project No. 5, for approval of detail plans of the Flathead arch dam, filed on July 27 and October 29, 1936;

The Commission *finds*:

- (1) That the drawings designated Exhibit L, sheets 1 to 25, furnish adequate details of design and analysis of stresses in the dam to meet the requirements of article 4 of the license as amended on July 17, 1936;
- (2) That the plans have been approved, so far as they affect the navigable capacity of navigable waters of the United States by the Secretary of War and the Chief of Engineers, subject to the condition that revised detailed plans showing any necessary changes in the abutments of the dam, and plans of the water cushion or apron below the dam be submitted for approval as developed by the licensee;
- (3) That the plans have been examined and recommended for approval, subject to the same condition by the Bureau of Engineering;
- (4) That the inclusion of said plans in the license and appropriate changes in the text of the license are

not such alterations as to require public notice or approval of the Secretary of the Interior.

And the Commission *orders*:

- (1) That the plans designated Exhibit L, sheet 1 (F.P.C. No. 5-22), "Arch Dam Design—Plan, Elevation and Sections of Dam"; Exhibit L, sheet 24 (F.P.C. No. 5-45), "Dam—Intermediate Piers—Plan, Elevation and Sections"; and Exhibit L, sheet 25 (F.P.C. No. 5-46). "Dam—Abutments and Base Block—Plan, Elevation and Sections," be and they are hereby approved as a part of said license;
- (2) That article 4 of said license be amended by striking out the sentence added by the amendment of July 17, 1936, and substituting the following: "Revised plans showing any changes in the design of the dam or abutments which may be found necessary after excavation of foundations, and plans of the water cushion or apron to be provided below the dam shall be submitted for approval as developed by the licensee."

. . . . .

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FEDERAL POWER COMMISSION

Project No. 5

APPLICATION OF

ROCKY MOUNTAIN POWER COMPANY

**Authorization for Amendment of License (Major)**

Upon application filed August 2, 1937, by the Rocky Mountain Power Company, licensee under the license for Project No. 5, for approval of the installation on the dam, concurrently with the installation of the first 77,000-horsepower generating unit, of spillway crest



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gates 27 feet high, the tops of said gates when at full height to be at elevation 2896;

And it appearing:

That the second paragraph of Article 6 of the license for said Project No. 5, as amended on July 17, 1936, reads as follows:

“The spillway crest gates shall not be installed until such time subsequent to the date of original operation of the plant as may be determined by the Commission or by the licensee with the approval of the Commission, in conformity with the provisions of Section 13 of the Federal Power Act. In making the installation of the first 77,000-horsepower generating unit, the licensee shall have the right to postpone the construction of the crest gates on the dam, together with their intermediate piers and supports as well as the tunnel for unit No. 2, until such time as the construction of those items shall become necessary under the provisions of Section 13 of the Federal Power Act”;

The Commission, having considered said application, the information therein contained, reports thereon, including the report of the Secretary of the Interior, and the record of proceedings had with reference to said license, *finds*:

- (1) There has been an unprecedented water shortage occurring simultaneously with a rapid increase in the consumption of power, in western Montana, since July 17, 1936, when the second paragraph of Article 6 was amended as above stated, and as a result thereof, the installation of said spillway gates as a part of the initial project is necessary to supply the reasonable needs of the market available when con-

struction of the initial project will have been completed;

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- (2) The Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and the Secretary of the Interior have approved the amendment of said license as hereinafter provided;
- (3) Insofar as pertinent to said amendment none of the other facts upon which the issuance or amendment of said license was based has been changed;
- (4) The amendment of said license as hereinafter provided is not such an alteration as to require public notice;

And the Commission *orders*:

That the second paragraph of Article 6 of the license, as amended July 17, 1936, for said Project No. 5, be further amended to read as follows:

"The spillway crest gates and intermediate piers and supports shall be installed concurrently with the first 77,000-horsepower generating unit; but the licensee shall have the right to postpone the construction of the tunnel for the second 77,000-horsepower generating unit until said generating unit shall become necessary under the provisions of Section 13 of the Federal Power Act; provided, that the approval thus given for the installation of spillway crest gates shall not be taken as affecting or modifying in any way the provisions of the license as amended which relate to regulation of the elevation of Flathead Lake; and provided further, that the tops of the crest gates shall be maintained at not to exceed elevation 2894.5 feet from the first day of

(9097)

April to the first day of November of each year during the remainder of the license period."

\* \* \* \* \*

I, LEON M. FUQUAY, Secretary of the Federal Power Commission, hereby certify that the foregoing is a true and correct copy of a portion of the minutes of a meeting of the Federal Power Commission in the City of Washington, District of Columbia, on the 15th day of October, 1937.

In testimony whereof, I have hereunto set my hand and caused the seal of the Federal Power Commission to be affixed at the City of Washington, District of Columbia, this 16th day of November, 1937.

LEON M. FUQUAY  
*Secretary.*

\* \* \* \* \*

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INSTRUMENT No. 7

FEDERAL POWER COMMISSION

**Amendment No. 7 and Approval of Transfer of License**

**Project No. 5—Montana**

**Rocky Mountain Power Company**

Pursuant to the orders of the Commission dated May 18, 1938, and July 26, 1938, and with the approval of the Secretary of the Interior, the license for Project No. 5, issued May 23, 1930, to the Rocky Mountain Power Company and subsequently amended, is hereby further amended as follows:

*Paragraph I.* Articles 36 and 39 of the license as amended and the guarantee of The Montana Power Company attached to the license and amended by Paragraph X of the amendment of July 17, 1936, are eliminated from the license.

(9110)

*Paragraph II.* Article 6 of the license as amended is further amended by eliminating the second sentence of the first paragraph and all of the third, fourth, and fifth paragraphs thereof so that the entire article shall read:

*Article 6.*—The Licensee shall renew construction operations of the said project works within 30 days from the effective date of this amendment and shall thereafter, in good faith and with due diligence, prosecute such construction operations and shall on or before May 23, 1939, complete the installation of one unit of not less than 77,000 horsepower capacity; and, subject to the provisions of Section 13 of the Federal Power Act, shall install an additional unit of 77,000 horsepower capacity.

The spillway crest gates and intermediate piers and supports shall be installed concurrently with the first 77,000 horsepower generating unit; but the Licensee shall

9110

have the right to postpone the construction of the tunnel for the second 77,000 horsepower generating unit until said generating unit shall become necessary under the provisions of Section 13 of the Federal Power Act; provided, that the approval thus given for the installation of spillway crest gates shall not be taken as affecting or modifying in any way the provisions of the license as amended which relate to regulation of the elevation of Flathead Lake; and provided further, that the tops of the crest gates shall be maintained at not to exceed elevation 2,894.5 feet from the first day of April to the first day of November of each year during the remainder of the license period.

*Paragraph III.* Article 30, paragraph (A) of the license as amended is further amended by eliminating therefrom

(9110)

the reference to The Montana Power Company as a corporation separate from the Licensee in the first and second lines of the sentence following the "Schedule of Interest Payments" so that the sentence shall read:

It is agreed that should the said Licensee pay the whole or any part of the deferred charges in advance of the due date provided for under the amended schedule herein, interest shall be paid only in so far as it actually has accrued.

*Paragraph IV.* Article 40 of the license is amended by eliminating therefrom the references to The Montana Power Company as a corporation separate from the Licensee so that the article shall read:

*Article 40*—The Licensee agrees that full and complete copies of rate schedules and all contracts of the Licensee for management and supervision of its affairs, or for general construction, which involve the Licensee or the project covered by this license, shall be filed with the Federal Power Commission promptly after execution. The Licensee agrees to file annually with the Federal Power Commission copies of its annual reports as rendered to The Montana Public Service Commission.

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*Paragraph V.* Article 43 of the license is amended by eliminating therefrom the references to The Montana Power Company as a corporation separate from the Licensee and the Rocky Mountain Power Company as the Licensee so that the article shall read:

*Article 43.*—Any and all defaults in the performance of any of the terms and conditions of the license prior to the granting of this amendment are waived. If for any cause beyond the control of the Licensee, the

power to be developed at the project is not produced or cannot be marketed, then and in such event, if the Licensee has paid or shall pay to the Confederated Salish and Kootenai Tribes of the Flathead Reservation a sum in liquidated damages, which together with all other amounts of liquidated damages paid to said tribe under the above-mentioned agreement between said tribe, the Rocky Mountain Power Company, and The Montana Power Company, will aggregate the sum of \$1,000,000, then Licensee at its option, after performing all acts required to be performed and making all payments required to be made by it to the date of surrender, under the license as amended, shall be entitled to surrender this license as amended and terminate all obligations thereunder and upon any such surrender all property of the Licensee located within the project boundary shall forthwith become the property of the United States, in trust for the aforesaid tribe; but prior to any such surrender nothing herein shall affect the right of the United States to a revocation of the license for the reasons and subject to the terms and conditions set forth in Sections 13 and 26 of the Federal Power Act.

*Paragraph VI.* The Federal Power Commission hereby approves the transfer, effective upon the issuance of this instrument, of the license for Project No. 5 as previously amended and as amended above, from Rocky Mountain Power Company to The Montana Power Company subject to the provisions and conditions of Section 8 of the Federal Power Act and subject to the following further conditions:

### 9112

- (a) That the Licensee shall deliver to and the transferee shall accept and permanently retain all maps, profiles, contracts, reports of engineers, accounts, books,

(9112)

records, and all other papers and documents relating to said original project and to all additions thereto and betterments thereof in possession of the Licensee as of the effective date of transfer;

(b) That in effecting the transfer of the license and the rights granted thereunder, neither the expenditures on account of said project nor the net investment therein shall be increased on account of said transfer;

(c) That the transferee shall establish and maintain books and accounts in accordance with the prescribed system of accounts adopted by the Commission, and shall enter therein such items as may from time to time be determined by the Commission.

IN WITNESS WHEREOF, the Federal Power Commission has caused its name to be signed hereto by CLAUDE L. DRAPER, its Acting Chairman, and its seal to be affixed hereto and attested by LEON M. FUQUAY, its Secretary, this 8th day of August 1938, pursuant to its orders dated May 18, 1938, and July 26, 1938, attached hereto.

FEDERAL POWER COMMISSION

By CLAUDE L. DRAPER  
Acting Chairman.

Attest:

LEON M. FUQUAY  
Secretary.

9113

IN TESTIMONY of their acceptance of the transfer of the license for Project No. 5, and the acceptance by The Montana Power Company of said license as amended by the foregoing amendment, the Rocky Mountain Power Company and The Montana Power Company this 3rd day of

(9113)

August, 1938, have caused their corporate names to be signed hereto and their corporate seals to be affixed hereto and attested, pursuant to resolutions of their respective boards of directors, which resolution of the Board of The Montana Power Company was duly adopted on the 27th day of July, 1938, and which resolution of the Board of Rocky Mountain Power Company was duly adopted on the 28th day of July, 1938, certified copies of the records of which are attached hereto.

ROCKY MOUNTAIN POWER COMPANY

By F. W. BIRD  
Vice-President

Attest:

C. J. COMMONS  
Assistant Secretary

THE MONTANA POWER COMPANY

By F. M. KERR  
President

Attest:

S. P. HOGAN  
Secretary

(Executed in triplicate)

Approved, effective as of August 8,  
and conditioned upon formal approval by the Confederated Salish and Kootenai Tribes within 90 days from said date.

Aug 15, 1938

E. K. BURLEW  
Acting Secretary of the  
Interior.



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UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Commissioners: Clyde L. Seavey, Acting Chairman;  
Claude L. Draper, Basil Manly, concurring; John W.  
Scott, dissenting.

May 18, 1938.

Project No. 5

IN RE

LICENSE ISSUED TO

ROCKY MOUNTAIN POWER COMPANY

**Order Approving Transfer of License for Major Project**

Upon joint application filed July 21, 1937, by Rocky Mountain Power Company, licensee under license for Project No. 5, issued May 23, 1930, and by The Montana Power Company, both companies having offices and principal place of business at 40 East Broadway, Butte, Montana, for approval of the transfer of said license to The Montana Power Company;

It appearing to the Commission that:

- (a) A hearing was held on said application on December 2, 1937;
- (b) The only properties owned by Rocky Mountain Power Company are the license for Project No. 5 and the project works constructed or under construction pursuant to said license, the funds for which have been advanced by The Montana Power Company;
- (c) Pursuant to a proposed plan of liquidation, all said power properties are to be transferred to The Mon-

(9115)

tana Power Company and the corporate existence of Rocky Mountain Power Company terminated;

- (d) Article 35 of said license provides in part that the licensee agrees to continue its separate corporate existence under the regulations of this Commission and that it will not enter into any merger with any other corporation or individual without the approval of this Commission previously obtained;

- (e) Article 36 of said license reads as follows:

“The Licensee agrees that it will enter into a contract with The Montana Power Company under which

**9115**

all electrical power or energy generated by the project covered by this license, except that delivered to or reserved for the United States pursuant to the provisions of this license, shall be delivered to or made available for said The Montana Power Company or its nominee upon the payment to the Licensee of an annual amount approximately sufficient to meet the operating expenses and maintenance costs, taxes, accruals for depreciation and rentals (including the rental charges provided for by this license) and in addition an average return of eight per cent per annum on its actual legitimate investment in all facilities and property covered by this license and used in the generation and delivery of such power, as established under the provisions of the Federal Water Power Act and the rules and regulations of the Commission issued in pursuance thereof. A duly certified copy of said power contract shall be filed with the Commission.”

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- (f) In consideration of the benefits to accrue to it from the operation of said Project No. 5, The Montana Power Company, guaranteed the full performance by Rocky Mountain Power Company, during the continuance of said license, of all the terms and conditions thereof, including the payment of annual charges therein provided, and further agreed to enter into the power contract provided for in said Article 36.

The Commission having considered said application, and all matters of record pertaining thereto, *finds* that:

- (1) The Secretary of the Interior who has supervision of the Flathead Indian Reservation, upon which said project is situated, and the Tribal Council of the Confederated Salish and Kootenai Tribes of Indians, who own the lands within said reservation, have both approved the proposed transfer of license upon the condition that The Montana Power Company assume all obligations of the licensee under the license and under the provisions of an agreement executed June 17, 1936, between said Tribes and the applicants;
- (2) The Montana Power Company is a corporation organized under the laws of the State of New Jersey and has submitted satisfactory evidence of compliance with all applicable laws of the State of Montana, within which said project is located, with respect to bed and banks, and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting, and distributing power insofar as necessary to effect the purposes of said license;

## 9116

- (3) By virtue of the transfer of said license to The Montana Power Company, the proposed operation of the project works under license by The Montana Power Company directly, and the proposed termination of the corporate existence of Rocky Mountain Power Company, the purposes for which Article 36 was included in said license will cease to exist upon the consummation of the proposed transfer;
- (4) Approval of the transfer of said license to The Montana Power Company subject to the conditions hereinafter provided will be consistent with the public interest;

And the Commission *orders* that:

- (A) Said transfer of license be and it is hereby approved, subject to the conditions of Section 8 of the Federal Power Act *provided, however*, that this approval shall become effective only if and when all the following acts shall have been performed:

- (1) Rocky Mountain Power Company shall file an application with this Commission for an amendment of the license for Project No. 5 in the following respects:

- (a) To eliminate Article 36 thereof; and
- (b) To eliminate such other language or provisions of the license as will become inapplicable or ineffective as a result of the transfer of the license and project works to The Montana Power Company, the direct operation of the project works by The Montana Power Company, and the dissolution of Rocky Mountain Power Company; and

(9116)

- (c) To make such other changes in the license by way of substitution or addition of other provisions as will become necessary as a result of the elimination of said Article 36 and of such other inapplicable or ineffective provisions or language, and as a result of the transfer of the license and project works to The Montana Power Company, the direct operation of the project works by The Montana Power Company, and the dissolution of Rocky Mountain Power Company;
- (2) The Montana Power Company shall by proper instrument consent to said application for amendment of license;
- (3) The Commission shall execute an instrument amending the license in the above described respects following the previous execution of such instrument by Rocky Mountain Power Company and The Montana Power Company;

**9117**

- (B) The termination of the corporate existence of Rocky Mountain Power Company and the transfer of the project works to The Montana Power Company upon the consummation of the acts described in paragraph (A) of this order, be and they are hereby consented to by the Commission pursuant to Article 35 of the license;
- (C) This approval is further made subject to the condition that The Montana Power Company take over and assume all the obligations that Rocky Mountain Power Company now has under the agreement, executed June 17, 1936, by the applicants and the

(9118)

Confederated Salish and Kootenai Tribes of the  
Flathead Reservation.

By the Commission.

LEON M. FUQUAY  
Leon M. Fuquay  
Secretary.

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UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Commissioners: Clyde L. Seavey, Acting Chairman, Claude  
L. Draper, Basil Manly. John W. Scott not partici-  
pating.

July 26, 1938.

Project No. 5

IN RE

LICENSE ISSUED TO

ROCKY MOUNTAIN POWER COMPANY

**Order Authorizing Amendment and Transfer of License**

Upon application filed June 9, 1938, by the Rocky Mountain  
Power Company, licensee for Project No. 5, for amend-  
ment of the license to provide for its transfer to The  
Montana Power Company; and

Upon consent to the application and assumption of obli-  
gations of the Rocky Mountain Power Company, filed  
June 9, 1938, by The Montana Power Company; and

It appearing to the Commission that:

The application, consent, and assumption of obliga-  
tions were executed and filed pursuant to the Commis-

(9118)

sion's order of May 18, 1938, approving the transfer of license upon certain specified conditions;

The Commission *finds* that:

The application, consent, and assumption of obligations, with the terms hereinafter provided, satisfy the aforesaid conditions; and

The Commission *orders* that:

The license for Project No. 5 be further amended as specified in the instrument designated as Instrument No. 7 of the license and its transfer to The Montana Power Company be made effective upon issuance of said amendment.

By the Commission.

LEON M. FUQUAY  
Leon M. Fuquay  
Secretary.

. . . . .

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**Certificate**

STATE OF MONTANA }  
County of Lake } ss:

Edwin Dupuis and Louis Lemery, each being first duly sworn, on oath, depose and say:

That they are the duly elected, qualified and acting President and Secretary of the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation and that the said Edwin Dupuis presided and acted as President and the said Louis Lemery acted as Secretary of a Special Meeting of the said Tribal Council, duly and regularly called and held at the Flathead Indian Agency, Dixon, Montana, at 1:00 o'clock, P.M., on the 29th day of August, 1938.

That the following is a complete and correct copy of the Minutes of the said Special Meeting of the said Tribal Council, held at the Flathead Indian Agency at said time and place, insofar as those Minutes relate to the Orders of the Federal Power Commission, dated May 18th, 1938, and July 26th, 1938, respectively, relating to the transfer of License for Project No. 5-Montana from Rocky Mountain Power Company to The Montana Power Company and insofar as those Minutes relate to Instrument No. 7, entitled:"

"FEDERAL POWER COMMISSION

AMENDMENT NO. 7 AND APPROVAL OF TRANSFER OF LICENSE

PROJECT NO. 5 —MONTANA

ROCKY MOUNTAIN POWER COMPANY",

and that the said Minutes truly and correctly show the action of said Tribal Council at said Meeting.

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The President stated to the Council that at a Meeting of this Council on July 16th, 1937, this Council had approved a joint application of Rocky Mountain Power Company and The Montana Power Company to the Federal Power Commission for the approval of the transfer from Rocky Mountain Power Company to The Montana Power Company of that certain License issued by the Federal Power Commission for the so-called "Flathead Project", known as "Project No. 5-Montana" and had consented to and approved the assignment and transfer of that License by Rocky Mountain Power Company to The Montana Power Company; that the Federal Power Commission of the United States, in connection with the transfer of the License for Project No. 5-Montana to The Montana Power Company, has required an Amendment to the License for



(9126)

Project No. 5-Montana, which Amendment has been accepted by Rocky Mountain Power Company and The Montana Power Company and has been approved by the Federal Power Commission and by the Secretary of the Interior and that the Amendment of the License and the approval of the Transfer of License by Rocky Mountain Power Company to The Montana Power Company is now again submitted to this Tribal Council for final approval. The President then presented to the Council a letter, addressed to L. W. Shotwell from John Herrick, Acting Commissioner, and a letter from E. K. Burlew, Acting Secretary of the Interior of the United States, dated August 15th, 1938, also a document entitled:

“INSTRUMENT No. 7

FEDERAL POWER COMMISSION

AMENDMENT No. 7 AND APPROVAL OF TRANSFER OF LICENSE

PROJECT No. 5 —MONTANA

ROCKY MOUNTAIN POWER COMPANY”,

which document contains a copy of an Order of the Federal Power

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Commission dated May 18th, 1938, entitled:

“Project No. 5

ORDER APPROVING TRANSFER OF  
LICENSE FOR MAJOR PROJECT”,

and a copy of an Order of the Federal Power Commission,  
dated July 26th, 1938, entitled:

“Project No. 5

ORDER AUTHORIZING AMENDMENT  
AND TRANSFER OF LICENSE”,

and the said Letter and the said Document entitled:

“INSTRUMENT No. 7

FEDERAL POWER COMMISSION

AMENDMENT No. 7 AND APPROVAL OF TRANSFER OF LICENSE  
PROJECT No. 5 —MONTANA

ROCKY MOUNTAIN POWER COMPANY”,

together with the two Orders of the Federal Power Commission, dated May 18th, 1938, and July 26th, 1938, above referred to, were read at length to the Meeting.

The President then stated to the Tribal Council that the Council should consider the question of approving said Instrument No. 7, which Instrument contains Amendment No. 7 and the two Orders of the Federal Power Commission, all of which have been read to the Council. After a complete discussion, it was, on motion duly and regularly made, seconded and adopted by a majority of the members of the tribal council present at the Meeting,

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RESOLVED, That Instrument No. 7, as presented to this Meeting of the Tribal Council, entitled:

“INSTRUMENT No. 7

FEDERAL POWER COMMISSION

AMENDMENT No. 7 AND APPROVAL OF TRANSFER OF LICENSE

PROJECT No. 5 —MONTANA

ROCKY MOUNTAIN POWER COMPANY”,

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and containing Amendment No. 7 and Approval of Transfer of License for Project No. 5-Montana, together with the Order of the Federal Power Commission, dated May 18th, 1938, entitled:

“Project No. 5

ORDER APPROVING TRANSFER OF

LICENSE FOR MAJOR PROJECT”,

and the Order of the Federal Power Commission, dated July 26th, 1938, entitled:

“Project No. 5

ORDER AUTHORIZING AMENDMENT

AND TRANSFER OF LICENSE”,

be and they hereby are approved and consented to; and further

RESOLVED, That the President and Secretary of the Tribal Council of the Confederated Salish & Kootenai Tribes of the Flathead Reservation be and they hereby are authorized and directed to advise the Secretary of the Interior of the United States and the Federal Power Commission in Washington, D. C., of this Consent and Approval of this Tribal Council to the said Instrument No. 7, including Amendment No. 7 and Approval of Transfer of License for Project No. 5-

(9340)

Montana and the two Orders of the Federal Power Commission, described in this Resolution.

EDWIN DUPUIS  
*President—Tribal Council*

LOUIS LEMERY  
*Secretary—Tribal Council*

APPROVED:

L. W. SHOTWELL  
*Sup't—Flathead Indian Agency*

SUBSCRIBED & SWORN To before me this 6 day of Sept.,  
1938

S. J. LOZAR  
*Notary Public for the State  
of Montana. Residing at  
Dixon Mont., Montana.*

My Commission expires Aug. 10, 1940.

\* \* \* \* \*

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[Received March 23, 1962]

Amendment No. 13  
Instrument No. 15

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman;  
Frederick Soreck, Arthur Kline and Paul A. Sweeney.

The Montana Power Company ) Project No. 5

Order Modifying and Adopting Initial Decision of Presiding  
Examiner and Examiner's Further Decision Upon Reopened  
Hearing

(Issued January 30, 1961)

\* \* \* \* \*

(9340)

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(C) The license issued to The Montana Power Company for Project No. 5 is further amended, effective as of January 1, 1952, as follows:

PARAGRAPH I. Article 2 of the license is further amended to include:

(i) The installation of a third generating unit consisting of a hydraulic turbine rated at 78,500 horsepower maximum capacity, with design head of 189 feet, and generator rated at 56,000 kw. located in a new addition to the present powerhouse a short distance downstream from the existing dam structure;

(ii) The construction of a new intake upstream of, but separate from the existing intakes, and to be of similar construction;

(iii) The construction of a new tunnel substantially identical with the existing tunnels and about 900 feet long; and

(iv) The installation of three 18,666 kva, 13.2 to 115 kv single-phase, water-cooled transformers and associated apparatus.

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9425

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J.  
O'Connor, Jr., Charles R. Ross, and David S. Black.

Project No. 5

THE MONTANA POWER COMPANY

Order Fixing Hearing

(Issued March 29, 1965)

The Confederated Salish and Kootenai Tribes of the Flathead Reservation, organized on October 28, 1935, under the Indian Reorganization Act of June 18, 1934, (Confederated Tribes), filed a petition for readjustment of annual charges under subsection 10(e) of the Federal Power Act<sup>1</sup> for use of tribal lands by The Montana Power Company (the Company) for operation of its Kerr Project No. 5 on the Flathead River in Montana.

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<sup>1</sup> The pertinent provisions of subsection 10(e) involved read as follows:

... Provided, that when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in Section 16 of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter *upon notice and opportunity for hearing.*

Note—The italics has been supplied to indicate the language which was inserted in this section by the amendment of 1935 in place of: “*in a manner to be described in each license.*”

(9425)

Action on the petition of the Confederated Tribes was deferred pending a decision in a then pending proceeding to fix annual charges for a third generating unit which had been added at the Kerr Project (22 FPC 502; 25 FPC 221). The Commission's orders were affirmed in *The Montana Power Company v. FPC*, 298 F. 2d 335, decided on January 25, 1962.

Subsequent efforts by both the Confederated Tribes and the Company to arrive at an agreement on readjustment of annual charges have failed because of differences which are best illustrated by their statements of position and replies thereto submitted under dates of April 5, and May 7, and April 3, May 8, and July 24, 1964.

9426

Subsection 10(e), as amended, provides that the Commission may readjust annual charges after 20 years of operation after notice and opportunity for hearing. At the time the license for Project No. 5 was issued subsection 10(e) provided that the Commission might readjust annual charges for 20 years of operation in a manner to be described in each license. That manner is set forth in Article 30(D):

Article 30(D)

• • • • •

The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operation under this license and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission, and the Secretary of the Interior cannot agree upon readjustment of such

charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in "The United States Arbitration Act," (U.S.C., Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purposes for which suitable, including power development.

Essentially this Article provided for readjustment by agreement between the Commission and the Licensee with the approval of the Secretary of the Interior, or by arbitration if the Commission, the Secretary, and the Licensee could not agree. In 1935, Section 10(e) was amended to give the Commission authority to make such readjustments as may be appropriate.

The Confederated Tribes contend that readjustment is necessary and that it should be made by the Commission pursuant to Section 10(e) of the Act, as amended in 1935. The Company contends readjustment is unnecessary, but if it were necessary, it must be made in accordance with Article 30(D) of the license. We do not find it necessary to determine at this time the question of whether any readjusted charges are to be finally determined pursuant to the 1935 amendment to Section 10(e) or pursuant to the manner described in Article 30(D) of the license. Under either situation, the Commission would have to determine whether it believes any readjustment is appropriate and this determination, we believe, can be made only after an evidentiary hearing.

We shall, therefore set this matter for hearing to determine (1) whether readjustment is necessary; (2) if so, what the readjustment should be; and (3) whether any



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such readjustment should be ordered by the Commission in this proceeding pursuant to the provisions of Section 10(e) of the Act as amended. Since the latter question appears to be solely a matter of law, we do not contemplate that any evidence will be introduced thereon but the parties may, of course, argue the matter to the examiner and the Commission by way of a brief.

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*The Commission finds:*

It is appropriate and in the public interest to hold a public hearing, as hereinafter provided, respecting: (1) whether annual charges for the occupancy and use of lands of the Confederated Tribes by Project No. 5 of the Company should be readjusted; (2) if such charges should be readjusted, the amount of the readjusted charges; and (3) whether any such readjusted charges should be ordered by the Commission in this proceeding pursuant to the provisions of Section 10(e) of the Act as amended.

*The Commission orders:*

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by the Federal Power Act, particularly Sections 10(e) and 308 thereof, and the Commission's Rules of Practice and Procedure, a public hearing shall be held on July 20, 1965 at 10 a.m., (EDST) in a hearing room of the Federal Power Commission, 441 G Street, N.W., Washington, D. C., respecting the matters involved and issues presented in the above finding.

(B) The following procedure is prescribed for this proceeding:

(1) The Confederated Tribes and the Company shall file by May 25, 1965 with the Secretary of the Com-

mission an original and ten copies of all their testimony including qualifications of witness, and exhibits to be presented in their direct cases;

(2) Commission Staff shall file by June 25, 1965 with the Secretary, an original and ten copies of all of its direct testimony and exhibits, including qualifications of witnesses;

(3) All motions to strike shall be filed with the Presiding Examiner by July 5, 1965 with replies to such motions to be filed by July 13, 1965;

(4) All of the testimony, except exhibits, shall be in question and answer form;

(5) No exhibits, except those of which official notice may properly be taken, shall contain narrative material other than brief explanatory notes;

(6) Any party submitting more than one exhibit shall enclose a cover sheet listing the title of each exhibit in the sequence they are to be marked for identification;

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(7) The presiding Examiner will specify the order of cross-examination and time to be permitted for preparation of rebuttal evidence.

(C) The Commission's Rules of Practice and Procedure shall apply in this proceeding except to the extent that they are modified or supplemented herein.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,  
*Secretary*

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UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Project No. 5

IN THE MATTER OF  
THE MONTANA POWER COMPANY

Objection and Answer of Secretary of the Interior  
Stewart L. Udall to Montana Power Company's  
Motion for Issuance of Subpoena

BEFORE PRESIDING EXAMINER AMES W. WILLIAMS

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III.

The Company states as a further ground in support of the application for subpoena that Secretary Udall should be required "to testify on behalf of the Federal Power Commission in clarification of his position as a party herein in the light of his counsel's statement at the prehearing conference held at Washington, D. C. on June 22, 1965, that the Secretary may or may not consider himself bound to ultimately accept or reject the method or formula of valuation adopted by the Commission."

In this instance, the Company is seeking—not to elicit factual materials but rather—to inquire about a legal position, a matter not properly subject to disclosure by subpoena. Nonetheless, Secretary Udall now reaffirms his intention to participate in this proceeding in full compliance with the Commission's rules and regulations. After,

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5        however, the proceeding has reached its conclusion, including the exhaustion of appellate procedures, the Secretary then has a responsibility to determine whether the Commission's findings should be accepted or rejected.

In addition to such other bases as may exist for the exercise of this responsibility, section 4(e) of the Federal Power Act makes all license provisions affecting Tribal lands subject to review by the Secretary of the Interior, and section 10(e) makes any findings by the Commission with respect to the readjustment of annual charges for Tribal lands subject to approval by the Tribes themselves. The Tribes may, however, exercise such right of approval only in concurrence with the Secretary, who acts as trustee for their interests.

Moreover, under Article 41 of the Kerr license, it is specifically provided that any change in the terms that may affect the interests of the Flathead Indians (which would quite clearly include a change in the annual charges) shall be subject to the Secretary's approval. Therefore, even assuming that the arbitration provision of Article 30 (D) of the license still controls (rather than the section 10(e) of the Act, as amended), findings by arbitrators would be the equivalent of findings by the Commission. In both cases, the proceedings constitute the mechanics by which a figure can be determined, which can then be presented to the Secretary for approval.

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WHEREFORE, it is respectfully requested that the application to subpoena Secretary Udall be denied.

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UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Project No. 5

THE MONTANA POWER COMPANY

PRESIDING EXAMINER'S INITIAL DECISION ON APPLICATION  
FOR READJUSTMENT OF ANNUAL CHARGES FOR USE OF  
TRIBAL LANDS PURSUANT TO SECTION 10(e) OF THE  
FEDERAL POWER ACT, AS AMENDED

(Issued August 4, 1966)

APPEARANCES

*Joseph A. McElwain, Willard W. Gatchell and Krest Cyr*  
for The Montana Power Company

*John W. Cragun, Richard A. Baenen and Charles Moran*  
*Goetz* for Confederated Salish and Kootenai Tribes  
of Flathead Reservation, Montana

*Newton Frishberg, Margaret Ellenbogen and Ernest London*  
for the Secretary of the Interior

*Donald A. Sander and George Bruder* for the Staff of the  
Federal Power Commission

WILLIAMS, PRESIDING EXAMINER: This matter came on for  
hearing pursuant to the petition of the Confederated Salish

(9713)

and Kootenai Tribes of the Flathead Reservation (hereinafter called Tribes)<sup>1</sup> filed on May 19, 1959, requesting the Federal Power Commission (hereinafter called Commission) to readjust the annual charges paid by The Montana Power Company (hereinafter called Company) for the latter's use of tribal lands embraced in the Kerr Hydroelectric Development, also known as Project No. 5, as contemplated by Section 10(e) of the Federal Power Act, as amended August 26, 1935 (49 Stat. 838, 16 U.S.C. 791 a-825 r) and Article 30(D) of the Project No. 5 License.

### 9713

Project No. 5, which has an installed capacity of 168,000 kilowatts, is located on Flathead River and Flathead Lake about five miles downstream from Poulson, in Flathead and Lake Counties, Montana. Flathead Lake serves as the project reservoir.

Pursuant to the Hell Gate Treaty of July 16, 1855 (12 Stat. 975), the Tribes own the lands underlying the southern half of the lake and the lands occupied by the dam and powerhouse.

Kerr Dam is a variable radius concrete arch, 381 feet long and 200 feet high, with a radius of 179 feet at the top. The storage capacity of Flathead Lake between elevations 2883 and 2893 feet is 1,217,000 acre feet. The installation has three generating units, the first and second of which are 77,000 horsepower and were placed in service on May 20, 1939, and May 31, 1949, respectively. The third unit, a 78,000-horsepower turbine, came on the line December 5, 1954.

Section 10(e) of the Federal Power Act, as amended, authorizes the readjustment of annual charges for the use of

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<sup>1</sup> The Tribes were organized under the Indian Reorganization Act, 25 U.S.C. 461-479, on October 28, 1935.

(9713)

Indian lands after the development has been available for service for twenty years and thereafter at intervals of not less than ten years. The annual charges as originally fixed by the Commission and supplemented by the Commission's decision involving the installation of the third turbine in 1954 presently amount to \$238,375.

The Tribes' petition for readjustment was filed promptly upon the completion of the twenty-year period, May 19, 1959, but no action was taken thereon because a proceeding was then pending with respect to the fixing of annual charges for the third unit. This matter was finally determined on January 25, 1962, in the case of *Montana Power Company v. F.P.C.* 298 F.2d 335.

Upon failure of the parties to negotiate a mutually satisfactory readjustment of the annual charges, the Commission, pursuant to Section 10(e) of the Act, as amended, set the matter for hearing to determine: (1) whether annual charges for the occupancy and use of lands of the Confederated Tribes by Project No. 5 of the Company should be readjusted; (2) if such charges should be readjusted, the amount of the readjusted charges; and (3) whether any such readjusted charges should be ordered by the Commission in this proceeding pursuant to the provisions of Section 10(e) of the Act, as amended.

In setting the hearing, the Commission recognized as a question of law the contention of the Company that the Commission lacks the jurisdiction to hear the dispute and permitted argument and the presentation of briefs upon this basic issue. It is the position of the Company that Article 30(D) of the original license, which provides for the readjustment of annual charges by agreement between the

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Commission and the licensee with the approval of the Secretary of the Interior, or by arbitration pursuant to the U.S. Arbitration Act (9 U.S.C. 2) if the Commission, the Secretary and the licensee cannot agree, is controlling and not Section 10(e) of the Federal Power Act, as amended.

Shortly before hearings commenced the Company sought to stay the proceeding and to compel compliance with the arbitration provision of Article 30(D) of the license by filing a petition in the U.S. District Court for the District of Montana, Butte Division. The Court, however, dismissed the action forthwith, stating that the exclusive jurisdiction to determine the issue lies with the Federal Power Commission and the Court of Appeals under Section 313(b) of the Federal Power Act [16 U.S.C. 8251].

On May 21, 1965, the Commission granted the Secretary of the Interior (hereinafter called Secretary) the right to intervene and participate in the scheduled hearings as a party in interest.

A pretrial conference was held on June 22, 1965, and a stipulation as to certain noncontroversial facts was entered into by the parties. The Examiner was requested to rule at such time whether the scope of the hearing would be limited to the readjustment of annual charges for the first two units of the Kerr Project or would also include the annual charges for the third unit, installed in 1954.

On July 13, 1965, the Presiding Examiner ruled that the hearing would encompass the readjustment of annual charges for all three units of the Kerr Project as a whole, for reasons hereinafter set forth.

The hearing commenced on October 28, 1965, and was concluded on November 10, 1965. The record consists of



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1348 pages of transcript, 81 exhibits, and 37 items by reference to the files of the Commission. The case has been thoroughly briefed by all parties and oral argument was had before the Examiner on April 19, 1966.

Upon the basis of the entire record in this proceeding, including the briefs and arguments of the parties, the Examiner finds as follows: first, the Commission has jurisdiction of the cause under Section 10(e) of the Federal Power Act, as amended; second, April 30, 1959, marks the expiration of the initial twenty-year period of commercial operation of Project No. 5; third, the readjustment of charges, including those of the third unit of the Kerr installation, is properly within the ambit of this proceeding; and fourth, the annual charges for the occupancy and use of the tribal lands should be readjusted to the sum of \$850,000 a year for the ten-year period beginning May 1, 1959, the said payments to be retroactive to such date. The annual charges already paid by the Company pursuant to Article 30(A) of the license during the retroactive period shall first be deducted from the readjusted charges and the

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remaining cumulative balances shall bear 4 percent simple interest per annum as was allowed in the earlier Third Unit proceeding (22 FPC 502, 523).

#### THE ISSUE OF JURISDICTION

The Commission issued the original license for the Kerr Project on May 23, 1930, for a term of fifty years, to the Rocky Mountain Power Company, a wholly-owned subsidiary of The Montana Power Company, pursuant to the Federal Water Power Act (41 Stat. 1063, 16 U.S.C. 791-823) and with the approval of the Secretary of the Interior as required by law (45 Stat. 212, 213). The licensee was re-

quired to begin construction within one year and to complete the installation of three generators of not less than 150,000-horsepower aggregate capacity within three years. Performance of the agreement was guaranteed by the Company and approved by the Secretary of the Interior. Article 30(D) of the license provided for the payment of certain annual charges for the use of the tribal lands involved in the project and such charges were established by the Commission for the first twenty years of operation.

The Rocky Mountain Power Company and The Montana Power Company failed to meet the performance conditions of the license and upon request the licensee was granted an extension of time. A further extension was refused by the Secretary of the Interior on February 16, 1935, and this action was concurred in by the Commission on April 1, 1935. The case was then referred to the Attorney General for appropriate proceedings looking toward the revocation of the license.

In the interim, and while the license was allegedly in default the Federal Water Power Act underwent a metamorphosis and emerged from Congress on August 26, 1935, as the Federal Power Act (49 Stat. 838, 16 U.S.C. 791, *et. seq.*).

On October 28, 1935, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, were organized pursuant to the Indian Reorganization Act and took jurisdiction over the tribal lands as provided for in such legislation. Negotiations between the parties were resumed and Amendment No. 2 to the Kerr License resulted on July 17, 1936. Among other matters, the amendment provided for the waiver of claims and damages by the Tribes and for the revision of the annual charges Article 30(A).

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The amendment was accepted by the Tribes and approved by the Secretary of the Interior on June 18, 1936. On June 8, 1938, The Montana Power Company became the sole licensee vice its subsidiary, the Rocky Mountain Power Company.

#### 5716

When the Kerr License was issued to the Rocky Mountain Power Company in 1930, Section 10(e) of the Federal Water Power Act provided that readjustment of future annual charges would be made in accordance with the procedure set forth in each license.

Article 30(D), the pertinent paragraph in the Kerr License, provides for readjustment of annual charges as follows:

The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operation under this license and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission and the Secretary of the Interior can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in "The United States Arbitration Act," (U.S.C., Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development.

(9717)

Section 10(e) of the Federal Power Act, as amended August 26, 1935, however, gave the Commission express authority to readjust, subject to the approval of the Secretary of the Interior, the annual charges for the use of tribal lands.

The Company urges that all of the foregoing must be read in conjunction with Sections 6 and 28 of the Federal Power Act, as amended, which Sections provide that licenses issued under the Act may be altered only upon mutual agreement between the licensee and the Commission after due notice, and that no alteration or amendment of the Act shall affect any license theretofore issued under its provisions. These provisions are substantially the same as in Sections 6 and 28 of the Federal Water Power Act.

In support of this position, the Company cites the amendment in 1936 of Article 30(A) with the formal approval of the Secretary of the Interior, which, while readjusting the schedule of rental payments, left Article 30(D) of the license intact. It further notes that this amendment in no way curtailed or impinged upon its right to arbitration as provided in the original license.

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Therefore, all matters considered, the Company alleges that the Commission has no jurisdiction over the issue of readjustment of annual charges and that it has a fundamental and substantive right, since all negotiations have failed, to resort to arbitration in the manner provided for in the United States Arbitration Act, in strict conformity with the provisions of Article 30(D) of the license. It urges, therefore, that this proceeding be terminated in order that it may pursue its remedy under the United States Arbitration Act.

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The position of the Company must be rejected for a number of compelling reasons. First, the Examiner is not persuaded that the provision for recourse to arbitration contained in Article 30(D) of the Kerr License is a substantive right and, therefore, unaffected by the subsequent amendment of Section 10(e) of the Federal Power Act in 1935, notwithstanding the Company's claim that only by such arbitration can the Secretary of the Interior's apparent veto power<sup>2</sup> over the readjustment of annual charges be circumvented.

Arbitration by reason of its inherent nature is a procedural process, namely: a means, mechanism or device by which differences may be adjusted, reconciled or settled. The 1935 amendment of Section 10(e), by providing an unequivocal hearing procedure before the Commission, obviously did not deprive the Company of a *reasonable means* of determining a readjustment of annual charges. In addition to allowing the opportunity for a full hearing, it furnished the licensee with a facility for obtaining judicial review of the resulting determination.

The cases cited by counsel in their respective briefs, in the main, support this conclusion. Particularly in point is *Pennsylvania Power & Light Company v. F.P.C.*, 139 F.2d 445 (3d Cir. 1943), *cert. denied*, 321 U.S. 798 (1944), wherein it was contended that Section 14 of the Water Power Act, providing for a determination of net investment by a district court if the Commission and licensee disagreed, was a substantive right and, therefore, unaffected by the 1935 amendment of such sections of the Act which provided

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<sup>2</sup> The Court in the Third Unit Proceeding (298 F.2d 335, 338) interprets the phrase "subject to the approval of the Secretary of the Interior" as contained in Section 10(e) of the Federal Power Act, as amended, as a veto power.

(9718)

for a determination of the issue by the Commission. The court stated, in part, at page 453:

The licensee had no vested right to have its investment determined by one procedure rather than another at least so long as it was accorded a right to be heard and an ultimate judicial review. Accordingly the change of procedure which the 1935 amendment brought about did not, as applied to the present proceeding, violate the Fifth Amendment.

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Also, in *Safe Harbor Water Power Corp.*, 5 FPC 221 (1946), *aff'd*, 179 F.2d 179 (3d Cir. 1949), *cert. denied*, 339 U.S. 957 (1950), where a licensee under the Water Power Act contended that the amendment of Section 20 in 1935 was invalid because Section 28 precluded the alteration of a license without the consent of the licensee, the contention was rejected.

The Commission in deciding the issue stated, in part, at page 243:

One other contention advanced by Safe Harbor in regard to jurisdiction should be noticed. Safe Harbor contends that it cannot be regulated under any provisions other than those in Section 20, because it construes its license to be a contract, and argues that the effect of Section 28, which saves outstanding licenses from alteration, together with its license, issued subject to the provisions of the Federal Water Power Act of 1920, is to protect the license from alteration by Congress without Safe Harbor's consent. It does not contend that the rate fixed by this Commission under Section 20 would be any different from that fixed under Part II. Safe Harbor's objection, then, amounts to no more than that Congress is without power to sub-

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stitute determination by one agency, for that by another. The alteration opposed here is one of procedure, and procedural changes may be effected without consent of the "licensee."

The holding in this case directly responds to the Company's protestation that Article 30(D) may not be amended without its consent, to wit:

If Congress has the authority, as the United States District Court for the District of Montana, Butte Division, appears to have recognized in *The Montana Power Company v. F.P.C., et al.*, Order No. 1251, issued May 24, 1965, to alter the overall judicial review procedure of Federal Water Power Act determinations, by virtue of Section 313(b) of the Federal Power Act, *a fortiori*, it can amend the procedure for making definitive determinations with respect to Section 10(e) thereof without infringing upon the substantive rights of a licensee, particularly since such determinations are subject to the same overall judicial review.

Staff counsel has advanced the additional argument that the arbitration provision of Article 30(D) is, in fact, a nullity because it is an unauthorized delegation of legislative authority. Counsel for the Secretary of the Interior, however, suggests that the provision is not an agreement to submit the readjustment of charges to arbitration under or subject to the provisions of the United States Arbitration Act,

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but an agreement to arbitrate *in the manner* provided for in the United States Arbitration Act.

If the latter postulate is accepted as valid, there is no subdelegation of Congressional power involved in Article

30(D) and the arbitration provision amounts to no more than a procedure to be followed under the Commission's aegis in order to resolve a deadlock in negotiations. Considerable substance accrues to this theory when it is recognized that at the time the Kerr License was issued, the Federal Power Commission was composed of three cabinet officers—the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of War, all serving as Commissioners on a part-time basis—upon whom the demands and responsibilities of the growing Commission exceeded the time they could afford from their principal duties.

The seeming ambiguity posed by Article 30(D), however, is, in the opinion of the Examiner, resolved by the House of Representative and Senate Committee reports on the amendment of Section 10(e) of the Federal Water Power Act in 1935 wherein it is stated:

The Commission's authority to adjust all charges from time to time *is made express*. (Italics added) H. Rept. No. 1318, 74th Cong., 1st Sess., 24-25 (1935).

The amendment also *makes explicit* the authority of the Commission to adjust from time to time all charges imposed under the act. (Italics added) S. Rept. No. 621, 74th Cong., 1st Sess., 45 (1935).

The import of these statements is that the Commission's authority to adjust all charges pursuant to Section 10(e) of the Federal Water Power Act was implied if not apparent, and the subsequent amendment of Section 10(e) reconciled the supposed conflict posed by Article 30(D) of the license.

Counsel for the Tribes additionally alleges that the license was in default at the time Section 10(e) of the Water Power Act was amended, and, therefore, the Company



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should be estopped from asserting that Section 10(e), as amended, does not control the readjustment procedure.

Since the Examiner finds that the procedural clarification effected by the amendment of Section 10(e) with respect to Article 30(D) of the license does not impinge upon any substantive right of the licensee, it is unnecessary to determine whether or not the license was actually in default at the time of the amendment of Section 10(e) or whether the Kerr License is a contract involving interstate commerce within the purview of the United States Arbitration Act.

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The Examiner is cognizant of the ultimate significance of the question as to whether or not the establishment of jurisdiction under Section 10(e), as amended, will bestow a veto power upon the Secretary of the Interior over a Federal Power Commission determination, but he feels that such problem is extraneous to this proceeding; likewise beyond the scope of this proceeding are the possible consequences of active participation in this hearing by the Secretary of the Interior, whose intervention was formally approved by the Commission.

WHEN READJUSTMENT OF CHARGES  
MAY BE AFFECTED

Section 10(e) of the Federal Water Power Act and Article 30(D) of the Kerr License provide for readjustment of annual charges for the use of Indian lands "at the end of twenty years after the beginning of operations" and "at the end of twenty (20) years after the beginning of operation under the license," respectively. In Section 10(e) of the Federal Power Act, as amended, the phrase was altered to read "at the end of twenty years after the project is available for service."

The time when the initial twenty-year period expires is an important issue in this case not only with respect to the charges which can accumulate from the end of the twenty-year period to date, but also because the established time will determine the running of the subsequent ten-year periods for possible further readjustment.

The date of the commencement of operations at Project No. 5 was not in issue in the so-called "Third Unit Proceeding," but statements in the Commission's and the Court of Appeals' decisions lend support to the date of May 20, 1939 (22 FPC 502, 504, 298 F.2d 335, 336).

The Tribes and the Company at first stipulated their agreement to such date, but later upon motion the Tribes was relieved of the stipulation because of the discovery of a Commission cost finding under Section 4(b) of the Federal Power Act, as amended, that Project No. 5 "was placed in commercial operation on August 1, 1938 (7 FPC 528, 530)." The Secretary of the Interior joins with the Tribes as a proponent of the August 1, 1938, date.

The record indicates (Item I by Reference) that the August 1, 1938, date was accepted by the Company for a limited accounting purpose relating primarily to the termination of interest charges and that it has no direct bearing upon the actuality of commercial operations.

Other evidence introduced reveals that some 1,103,000 kilowatt hours of electricity were generated at Project No. 5 during a 3-day period in the month of October, 1938, and that no further power was produced until May, 1939, when regular and continuous operations began.

Considering all the evidence, it is the conclusion of the Examiner that May 1, 1939,<sup>3</sup> marked the beginning of commercial operations at Project No. 5.

The *de minimis* generation of some \$3,500 to \$4,000 worth of power during the month of October, 1938, can more reasonably be accepted as a test run of the installed facilities followed by an interval of adjustments than the commencement of commercial operations involving the sale of power from the plant.

Other significant factors which have contributed to the Examiner's conclusion are the increase in the Schedule of Annual Charges under Article 30(A) (in May, 1939, the charge accelerated from \$1,000 to \$5,000 a month for the balance of 1939)<sup>4</sup> and the fact that the Tribes previously considered May, 1939, to be the correct date by filing its petition for readjustment in May, 1959, precisely twenty years after the beginning of operations.

Also at issue is whether the readjustment provided by Section 10(e) of the Federal Power Act at the end of the initial twenty-year period of operations becomes effective, insofar as readjusted annual charges are concerned, at the conclusion of the initial twenty-year period or when readjustment has, in fact, been accomplished at a later date either by way of negotiation or litigation.

The Company adopts the latter view and maintains that the annual charge for the years subsequent to 1954 should

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<sup>3</sup> May 1 rather than May 20, 1939, has been arbitrarily selected by the Examiner for ease of calculation of charges.

<sup>4</sup> During the course of hearing on the application of the Rocky Mountain Power Company for the amendment of its license, June 22, 1932, D. M. Kelly, speaking for the Company as to the meaning of "placed in commercial operations" stated "... in other words, it means when we start to sell power from this plant. That is when the increased rental begins."

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remain fixed at \$175,000<sup>5</sup> in accordance with Article 30(A) of the Kerr License until a readjustment is finally made and that no retroactive readjusted charges are contemplated by such provision of the license. The Company further alleges that it has no means of recouping retroactive readjusted payments as an operating expense reflected in its cost of service.

### 9722

The Examiner disagrees with the Company's contention and finds that the readjustment should take effect at a specific point in time, namely: at the end of the first twenty-year period, which he has determined to be May 1, 1959. Also, it would appear to the Examiner that, despite the failure upon the part of the Company to make adequate provision for retroactive readjusted payments through the maintenance of a reserve account, the rates of return enjoyed by the Company<sup>6</sup> over the years in question are sufficiently ample to absorb the ordered increase in the annual charge for Project No. 5.

The present proceeding clearly demonstrates the inequity of the Company's argument in that the Tribes would under the Company's theory be deprived of a substantial increase in compensation for the period between May, 1959, and the time this litigation is finally concluded.

### THE THIRD UNIT ISSUE

During the course of the prehearing conference held on June 25, 1965, the Company requested the Examiner to

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<sup>5</sup> Annual charge of \$63,375 for the third unit is not included.

<sup>6</sup> Witness Van Scoyoc's study shows that the earned rates of return on the Company's electric utility department net investment rate base ranged from a high of 11.19 percent to a low of 8.90 percent during the period 1949 through 1964. The average rate was 9.8 percent on this rate base.

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rule whether or not the ensuing formal proceeding would consider the readjustment of annual charges with respect to the third unit of Project No. 5, which became available for service in 1954, as well as the first and second generating units, which were installed in 1939 and 1949, respectively.

The parties were afforded an opportunity to fully brief the question and the Examiner ruled on July 13, 1965, that the hearing should consider the readjustment of annual charges to Project No. 5 as a whole.

This determination was predicated upon the belief that the third unit is an integral component of the Kerr project and a part of the project works. It was not the subject of a separate license, but was authorized as a part of Project No. 5 by way of an amendment to the original license.

In *Arkansas Power & Light Company*, Project No. 271, 26 FPC 549, the Commission rejected a piecemeal approach as urged by the Company, with

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respect to a Section 10(d) determination (amortization reserves) stating:

. . . In any event, the provisions of Section 10(d) apply to the project defined in the license as distinguished from some specified part thereof. Consequently, the amortization reserve period can commence only once with respect to the project defined in the license for Project No. 271, the application will be denied.

Logic dictates that the readjustment of annual charges should be undertaken for the project in its entirety and not with respect to the time each generator began commercial operations.

### THE ISSUE OF HEADWATER BENEFITS

Certain witnesses who testified in the course of this hearing have included in their respective determinations of readjusted annual charges the factor of benefits bestowed upon Project No. 5 by upstream storage installations.

The Examiner is of the opinion that such benefits are not properly a part of the readjusted determinations because storage to which they are related was nonexistent during the initial twenty-year period (1939-1959) with which this hearing is concerned. The particular benefits to Kerr were not, in point of fact, determined until February 6, 1963, when the Commission order was issued in the Columbia River Headwaters Benefit Investigation (29 FPC 238). Staff counsel has also pointed out that the inclusion of benefits from upstream storage in readjusted charges is incompatible with the "flat rental" concept upon which the original charges were calculated. Still another objection raised by Staff counsel is that the benefits to the Company are not based upon advantages in generation derived from hydraulic regulation alone, but under the Pacific Northwest Coordination Agreement, to which the Company is a party, many other benefits accrue by reason of the Company's interconnections with other systems, and the logical conclusion to be reached if this line of reasoning is followed, would be to include benefits from the purchase and sale of power by the Company not only from the Kerr installation, but from the system at large.

### THE NECESSITY FOR READJUSTMENT OF CHARGES

The Commission Order of March 29, 1965, specified three issues for hearing, the first of which is the question whether or not the readjustment of annual charges is necessary.

Both the Tribes and the Secretary by the nature of their affirmative presentations are convinced that a substantial

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upward readjustment is warranted by prevailing circumstances.

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The Company is of the opinion that no readjustment is necessary unless, perhaps, the present charges can be reduced or only slightly increased.

The Staff, however, following the Third Unit precedent, which held that a 25 percent share of the savings realized by the Company by installing a third generator in Kerr instead of resorting to an alternate source of power was adequate compensation, feels that an identical share is applicable to such savings with respect to the first two units of the project. Staff, therefore, recommends that the annual charges be readjusted to a 25 percent share of the economic benefits from all three units as of the end of the initial twenty-year period, April 30, 1959.

Staff also concludes, based upon the testimony of Witness Ritter, appearing upon behalf of the Secretary of the Interior, that the relative positions of the contracting parties are best maintained (the Company concedes that a change in such relationship may require readjustment of charges) if the Tribes' share of the net benefits from all three units is increased as herein recommended.

#### THE READJUSTMENT OF ANNUAL CHARGES

Table 10 of the Staff brief (modified below) sets forth, as applicable to all three units of Project No. 5, the annual charge now being paid by the Company in contrast with the proposed readjusted charges sponsored by the witnesses who testified on behalf of the various parties, such proposed readjusted charges to become effective twenty years after the commencement of the commercial operation of the project. The Examiner has determined such date to be May 1, 1959, and, therefore, the readjusted annual charges

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will run for a period of the next ten years, or until May 1, 1969.

PRESENT RENTAL—\$238,375

<u>Witness</u>	<u>Recommended Annual Payment to Tribes</u>
Staff	632,350 <sup>1, 2</sup>
Van Scoyoc (Tribes)	1,300,000
Sporseen (Tribes)	1,150,000
Mohler (Interior)	1,667,000
Woy (Montana) <sup>3</sup>	238,375
	352,500
Seymour (Montana)	270,000

<sup>1</sup> Staff's final proposed readjusted annual rental is \$611,250 under Scheme "C".

<sup>2</sup> Staff's original proposal sponsored by Witness Shepley was \$857,000.

<sup>3</sup> Witness Woy submitted two additional amounts as readjustments of the annual payment. These are hereinafter discussed.

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With the exception of the proposals by Witnesses Seymour and Woy, the recommended annual charges set forth above are derived through methods of calculation which are influenced by the commercial value of the Tribal lands and the Confederate Tribes' share of the flow of benefits from such valuation.

The two principal techniques utilized in this proceeding for determining the value of the Kerr power site are known as the "Sharing of the Net Benefits" and the "Profitability" methods.

The first procedure involves a resolution of the net benefits accruing to the Company through its exploitation and use of the Kerr power site under the terms of the license from the Commission. This determination is made by comparing the average annual cost of the production of



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power from Project No. 5 with the average annual cost of the production of equivalent power from the next best alternate source. The difference between the two average annual costs represents the net benefit to the Company of the Kerr power site over the alternate source, and the commercial value of the former. This method of valuation, with variations, was used by Witnesses Mohler, testifying for the Secretary of the Interior, Sporseen for the Tribes and Shepley for the Staff.

The "Profitability" method, employed by Witness Van Scoyoc, appearing for the Tribes, involves a determination of the commercial value of tribal lands and waters by first ascertaining the Company's annual electric revenues attributable to the Kerr installation. From such revenues for each year involved (1958-1964) are deducted the Company's annual cost of production for power at Project No. 5 and a reasonable rate of return upon the net investment in such facility. The remainder is the income applicable to the power site and the measure of profitability.

The next step requires that a determination be made as to the Tribes' equitable share of the net benefits or the profits, depending upon which method was used for the initial calculation. In the instant case a spectrum of percentages, hereinafter discussed, has been advanced by the various witnesses as the Tribes' proper share, ranging from a low of 25 percent to a high of 57.53 percent. The payments listed in the modified version of Staff's Table 10 reflect the application of such percentages to the respective net benefits or profits, as the case may be.

#### *The Position of the Company*

It is apparent from the testimony of Company Witnesses Seymour and Woy that regardless of the magnitude of the benefits or profits enjoyed by the Company as a result of its operation of Project No. 5 until May 1, 1959, the

end of the twenty-year period of operations under the license, they find no justification for a substantial increase in the present annual charge and would continue about the same yearly payment over the next ten-year period.

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While both witnesses rejected the methods for readjusting charges previously adumbrated, it is significant to note that they found the annual charge of \$63,375 ordered in the Third Unit proceeding (derived by the sharing of the net benefits method) to be reasonable.

Witness Seymour was of the opinion that any increase or sharing of benefits must be related to an evaluation of any "substantial changes in the physical circumstances of the project" occurring between its inception and the date for readjustment. Witness Seymour also differentiates between "readjustment" and "redetermination," holding that the former is not a *de novo* determination of charges, but a translation of physical changes which have taken place since the license was issued. He concludes that changes affecting Project No. 5 are as follows:

- (1) The addition of 13 downstream hydroelectric plants which benefit Kerr by payments for storage releases.
- (2) The upstream installation of the Hungry Horse Project in 1953.
- (3) The addition of the third generating unit to Project No. 5.

With respect to the installation of the third unit at Kerr, the witness is of the opinion that the sum of \$63,375, the annual charge as of 1954, is reasonable and nothing has subsequently occurred which would warrant any change in the amount of such payment.

As to the other changes cited by the witness in paragraphs (1) and (2) above, he finds that by evaluating the

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respective benefits and charges, the total net benefits from downstream installations, without including the third unit, amount to \$154,000. Of this figure, the witness would assign 25 percent to the Tribes as their equitable share, namely: \$38,500. This amount together with the original charge of \$175,000 for the first two units and the third unit charge of \$63,375 amounts to \$276,875 which the witness would round off to \$270,000 as the readjusted annual charge for the ten-year period of 1959 through 1969.

Witness Woy presented two means for determining what he considers to be a proper annual payment to the Tribes. Accepting the charge of \$63,375 ordered in the Third Unit proceeding, the witness then employed the formula used by the Commission in assessing annual charges for reimbursement to the United States for its costs in administering Part I of the Federal Power Act and thereby derived the respective unit values of energy and capacity. The resulting values applied to the horsepower capacity and energy of the first two units of Kerr produced a dollar figure of \$184,727 to which the witness added the third unit rental of \$63,375 making a total proposed annual charge of \$248,102.

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The second method propounded by Witness Woy involves the application of the so-called Pelton-Round Butte Formula—the agreed-upon rentals between the Warm Springs Indians and the Portland General Electric Company for the Pelton and Round Butte projects—to the Kerr installation. In this process, the unit capacity and energy rental charges of the former<sup>7</sup> are applied to the

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<sup>7</sup> The agreed annual charge for the Pelton project is 4 cents for each kilowatt of installed capacity per month (\$0.48 per KW per year) based on nameplate rating and one-tenth of one mill (\$0.0001) per kilowatt hour of energy produced.

capacity and output of the latter. The averages derived from the use of the Pelton and Round Butte approaches, giving equal weight to each, produce an average annual charge of \$253,830 when applied to Project No. 5.

Also in connection with the Company's Exhibit No. 7, comparing the cost of production at Kerr with system revenue, the witness supported the Company's claim that, proportionately, it received less for Kerr generated electricity in 1959 than in 1940.

Witness Woy also offered rebuttal testimony with respect to Company Exhibit No. 33, Calculation of Theoretical Benefit of Kerr Project Versus Realistic Historical Alternate for 3 Units as Constructed, the purport of which is that Kerr enjoys a net advantage in cost of service over the selected alternates in the amount of \$1,410,000 of which the Tribes' share is 25 percent or \$352,500.

In summation, it is evident that the proposals of the Company's witnesses bear little relationship to any realistic determination of the commercial value of the Kerr site. While both witnesses apparently agree that the charge of \$63,375 established in the Third Unit proceeding was a reasonable figure, neither would accept the method used in such proceeding as the proper means for readjusting the annual charge in the instant case.

Staff counsel points out that the Commission formula for the determination of annual administrative costs was developed for a purpose entirely unrelated to the readjustment of annual charges for the use of tribal lands and its use has no logical or meaningful application in this proceeding; also that the Pelton-Round Butte formula was rejected by the Commission in the Third Unit case. Counsel for the Secretary emphasizes that the Pelton and Round Butte projects are not comparable with Kerr because the lands are not as valuable and, by reason of the

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agreement between the Warm Springs Indians and the Portland General Electric Company, there is an entirely different schedule for the readjustment of annual charges.

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All the proponents of readjustment object to Witness Woy's comparisons of Kerr's annual production expenses with the Company's system revenue, maintaining that the revenues attributable to Kerr must be segregated and related to Kerr's annual costs.

As previously stated, the Examiner is of the opinion that the Company's proposals are not realistic when viewed in the light of the facts of record and furthermore, in the language of Article 30(D) of the Kerr License, they do not reflect as of 1959 the commercial value of the tribal lands involved. The proposed charges, all in the immediate vicinity of the current charge of \$238,375, are considered by the Examiner to be unreasonably low.<sup>8</sup> While profit sharing or a rental geared to profits (or losses) by the Company was rejected by the parties in determining the original charges, the language of Article 30(D) certainly contemplates that profitable operation of Project No. 5 should be reflected in the enhancement of the commercial value of the tribal lands embraced in the site. The readjustments proposed by the Company are, therefore, rejected by the Examiner.

#### *The Position of the Secretary of the Interior*

Witness Mohler, appearing in behalf of the Secretary, recommends an annual readjusted payment to the Tribes in the amount of \$1,667,000 for the ten-year period beginning on August 1, 1958.

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<sup>8</sup> The Consumer Price Index published by the Bureau of Labor Statistics, U. S. Department of Labor, shows that the purchasing power of the consumer dollar in 1959 is only 47.7 percent of the 1939 dollar.

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In arriving at this figure, the witness employed the Sharing of the Net Benefits method as used in the Third Unit proceeding. In substance, the witness compared the annual original cost of Kerr (adding annual production expense, state and local taxes and an adjustment for headwater storage, all related to the ten-year period under consideration) to the cost of alternative sources of generation which the Company would have had to provide if Kerr had not been available. These alternate sources are High Mountain Sheep, Buffalo Rapids Nos. 2 and 4, and a steam generating plant. On the basis of the savings developed by comparing Kerr with these alternatives, Witness Mohler derived savings of \$2,664,000, \$2,730,000 and \$3,551,000, respectively, to which he applied 55.9 percent as the share of savings allocated to the Tribes. After averaging these shares, the witness arrived at a readjusted annual charge of \$1,667,000.

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Staff counsel claims, however, that the figures used by Witness Mohler are not, in fact, comparable and that because Kerr was constructed at low cost the benefits are greatly magnified. Counsel for the Company also criticizes the comparison as misapplied because both Witness Mohler and Sporseen (appearing for the Tribes) have, in using the net benefits approach, attempted to compare projects having completely different construction periods and, of course, costs. Neither witness, according to the Company, has used the next most economical alternative source of power in making the comparison and, most important, both have used sources of power in their studies that were not available to the Company as an alternative to Kerr.

The Examiner believes that the objections raised by the Staff and the Company to Witness Mohler's proposals are

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well founded and he shares their view that the lapse of time between the construction of Kerr and the proposed alternates militates substantially against the validity of the comparison.

### *The Position of the Confederated Tribes*

Witness Sporseen, like Witness Mohler (appearing for the Secretary), used the "Sharing of the Net Benefits" approach in reaching his determination of a proper annual charge for the use of the tribal lands but instead of selecting three alternates covering the ten-year period, as did Mr. Mohler, he chose only one—a development at Buffalo Rapids Nos. 2 and 4.

Before selecting this development, however, the witness considered and rejected the alternatives of nuclear power from Hanford—a coal-fired steam plant, Canadian power to become available through the recently negotiated treaty between the United States and Canada—and purchased power from the Bonneville Power Administration or private utilities.

Witness Sporseen ascertained the average annual cost of producing power at Kerr from Company reports to be \$2,193,900 and the annual cost of his alternate development at Buffalo Rapids to be \$4,668,000 with a resulting net saving to the Company of approximately \$2,474,000. The witness concludes that the Tribes are entitled to 42.13 percent of this net benefit together with 25 percent of \$431,000—the amount he figures the Company derives from downstream benefits conferred by storage in Flat-head Lake—or a total annual charge of \$1,150,000.

Staff and the Company point out, as in the case of Witness Mohler, a lack of comparability in the costs of the respective projects, since 1939, 1949 and 1954 costs were used for Kerr as compared to 1959 costs for Buffalo



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Rapids. Also, the possibility exists that the latter project might not be available, since the Secretary and the Northwest Public Power Association have made known their opposition. A further objection by Staff runs to the derivation of the percentage assigned by the witness to the Tribes, which Staff alleges to be too conjectural to be sound.

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The Secretary, while taking exception to the witness' determination relative to headwater benefits, is of the belief that his conclusions are not unrealistic and that his study corroborates the projections of Witness Mohler.

The Tribes defend Witness Sporseen's selection of an alternate source of power, asserting that they are, in effect, penalized if the costs of the respective projects are compared at an interval of twenty years. The Tribes feel that the value of Kerr in 1959, rather than its earlier construction costs, is the proper figure for comparison with an alternative.

Witness Van Scoyoc, employing a process of deductive analysis and following accepted accounting methods as used in Commission's electric rate cases, made a detailed study of the revenues attributable to Kerr power production for each of the years from 1958 through 1964. The study embraces that share of the Company's total electric revenues reasonably attributed to Kerr together with a determination of the annual costs of producing power at Project No. 5, including a reasonable return on the net investment of the Company in the facilities used in the generation of such power. The annual costs deducted from the annual revenues, according to the witness, reflect the actual commercial value of the Kerr site or the profitability of the development to the Company.

The witness determined the Tribes' share of the income or profit attributable to Kerr to be 57.53 percent and,



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when related to the annual income applicable to the Kerr power site value of \$2,509,227 under normal water conditions, established the Tribes' share as \$1,443,558. This figure was then adjusted by Mr. Van Scoyoc to \$1,296,891, which reflects actual water conditions for two-thirds of the ten-year period. The amount was rounded by the witness to the sum of \$1,300,000 as the recommended annual rental for the ten-year period.

Mr. Van Scoyoc's analysis provides a realistic and impressive demonstration of the profitability of the operation of Project No. 5 for the years 1958 through 1964 but, in the opinion of the Examiner, there are a number of basic objections to its use in readjusting the annual charges in the instant case.

One point of disapproval raised by Staff was the complexity of the method. This criticism, however, detracts nothing from the able manner in which the witness performed his analysis or the credibility of his testimony. A further objection offered by Staff is that the study involves allocations on the basis of judgment and too many derived averages. This criticism, the Examiner feels, may be justly made with respect to practically all the methods of readjustment offered in the course of the hearing and, lacking any better or more precise means of coping with the problem, they must all be given full consideration despite the complications inherent in the respective methods.

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The Examiner rejects Mr. Van Scoyoc's approach principally because it is a form of profit sharing not contemplated or intended by the parties negotiating the original Kerr License and also, contrary to Article 30(D) of such license, the readjustment has been calculated for the 1958-1964 period rather than through and at the end of twenty-year period which terminated on April 30, 1959.

The Tribes' percentage of 57.53 of the profit attributable to Kerr also seems to the Examiner to be unduly large, particularly in contrast with the 25 percent deemed to be a reasonable share in the Third Unit proceeding.

The profitability of the Kerr operation, as demonstrated by Mr. Van Scoyoc, certainly, however, shows enhancement of the commercial value of the site and in a large measure justifies the readjusted charges as ordered by the Examiner herein without disturbing the initial concept of a fixed rental charge throughout the Company's use of the tribal lands.

#### *The Position of the Staff*

The Staff in presenting its case for readjustment of annual charges based upon a Sharing of the Net Benefits method cites the prior approval of the Commission and the Secretary of such approach in determining the annual charges for the third unit at Kerr. Staff also notes that the Court of Appeals, while not specifically adopting that method, found that the results arrived at by its application were not unreasonable.<sup>9</sup>

As part of its original presentation, in selecting an alternative to Kerr, Staff assumed the construction of the most economical source of power available to the Company as of the approximate time the three units at Kerr were built in 1938, 1948 and 1954, respectively, in order that the cost and sizes of such installations would be comparable.

The Staff next assumed the operation of the units for the twenty-year period following the commencement of operations at Kerr upon the basis that the original negotiated annual charge was reasonable by virtue of its acceptance by the Company.

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<sup>9</sup> 298 F.2d 335, 340.

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During the course of the hearing the Staff shifted its position on the order of its choice of alternatives, which accounts for three separate determinations of annual charges. All three are consistent, however, with respect to the share of the benefits to which the Tribes are entitled, to wit, 25 percent. This percentage is derived from a rationale employed in the Third Unit case, which allots 50 percent of the total benefits to the

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owners of the power site<sup>10</sup> and the remaining 50 percent to the Company for underwriting the development of the site. Since the Company also owns half of the power site, it is entitled to an additional 25 percent of the benefits leaving the Tribes with 25 percent of the total benefits.

Staff's ultimate recommendation of a readjusted charge is the sum of \$611,250 under its so-called revised Scheme "C". A penultimate determination, designated as original Scheme "C", advanced the amount of \$632,350. The first determination, sponsored by Witness Shepley, suggested an annual readjusted charge of \$857,000. This latter figure was abandoned when the Staff subsequently acquiesced in the Company's view that Cochrane, a hydro project, is the proper alternative to the first unit at Kerr rather than the third which was the supposition in the Third Unit proceeding.

The Company also contended that purchased Bonneville Power Administration power was the most economical alternate to the Kerr third unit, but Staff rejected this view, citing the contrary testimony of the Company's witness, Mr. Bowman, who stated that a steam plant was the most logical alternative to Kerr in 1959.

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<sup>10</sup> The Examiner assumes the power site to embrace the Flathead Lake reservoir, and the lands occupied by the dam and powerhouse.

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The change in the net savings of the Staff recommendation from \$3,427,000 to \$2,529,400 was due, as indicated above, to the switching of alternate projects, supposedly because of the Company's claim that it could have constructed Cochrane in 1939 for \$3,627,013 or \$76 per KW of installed capacity. The cost in 1958 was calculated to be about \$10,395,560 or \$217 per KW of capacity. Staff did, however, adjust the cost of Cochrane to \$5,280,000 or \$110 per KW of installed capacity since the record shows that none of the Company's many hydro installations has been installed for less than the \$96 per KW of installed capacity for Kerr. The further reduction in the Staff recommendation of \$21,000 to \$611,250 was occasioned by its failure to use revised cost figures for Morony in estimating Cochrane's cost as the alternate to the first unit at Kerr.

Unfortunately, the Federal Power Act, the regulations issued pursuant thereto, and the Kerr License fail to provide any formula for the readjustment of annual charges, and in the absence of any more satisfactory means, a commercial valuation of the tribal lands involved, for the most profitable purpose for which suitable, including power development—as specified by Article 30(D) of the license—must be established.

The fact is unequivocally confirmed in this proceeding that the tribal lands involved are most valuable in their present use as a locus for the development or production of hydroelectric power.

In the attempt to fix a precise sum for this commercial value many different approaches to the mechanics of valuation and readjustment of charges have been advanced and, as so aptly stated by Staff counsel,

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“every method or almost every method has been taken up by an opposing party and has been modified to suit its own

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ends until we reach a point where regardless of what you say or do, Mr. Examiner, in your decision, you will have some support for it."

Since there is some support for every method, the primary criterion in reaching a determination as to the proper readjusted charge would seem to be the reasonableness of the results achieved by the various methods.

The Examiner finds that the original Staff position, as supported by Witness Shepley, employing steam plants of 60 MW each as alternatives to Kerr units one and two, placed in operation in 1938 and 1949, respectively, and Cochrane with a like capability of 60 MW as the alternative to the third unit at Kerr in 1959, provides the most reasonable assumption of alternates.

The annual cost of all Kerr units as estimated by Mr. Shepley for 1958 was \$2,218,000 (\$1,595,000 for Units No. 1 and No. 2 and \$623,000 for Unit No. 3). The comparative estimated cost for Cochrane was \$1,153,000.<sup>11</sup> The costs of the alternative steam plants were estimated at \$19.07 per kilowatt-year plus 2.68 mills per kilowatt-hour for 1958. With the alternative costs including Cochrane totalling \$5,645,000, the witness found the net savings to the Company from the ownership of Kerr to be \$3,213,000 over the two alternate steam plants for 1958 and \$214,000 above the cost of the third unit. The net annual saving over Cochrane provided by the third unit of Kerr was estimated to be \$214,000 in 1958 and thereby resulting in a total savings of \$3,427,000.

Witness Shepley stated no conclusion as to the proper share of savings to be assigned to the Tribes. He did testify, however, that a 25-percent share awarded to the

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<sup>11</sup> The annual cost was adjusted to \$837,000 to reflect the fact that the estimated average annual energy for the Cochrane project exceeds that of Kerr Unit No. 3.

(8734)

Tribes would produce a payment of \$857,000 if based upon 1958 costs.

A considerable portion of the record in this case is devoted to the percentages to be applied to the various dollar determinations of net benefits or profits sponsored by the parties, other than the Company, to reach what they individually conceive to be an appropriate readjusted annual charge.

Sheet one of the Appendix B of the Secretary's Opening Brief demonstrates the range of such percentages from 25 to 57.53.

#### 9734

The highest, proposed by Witness Van Scoyoc, was achieved by weighing the respective contributions to the power site of tribal and nontribal lands and waters. The ratio of 57.53 percent was derived by allocating critical-period generation at Kerr by megawatt months among natural stream flow, Flathead Lake storage and upstream storage at Hungry Horse.

Witness Sporseen is of the opinion that the Tribes' share of the Kerr power site is equal to 42.13 percent of the net benefits by reason of total ownership of the site and one-half of the reservoir.

Witness Mohler's percentage of 55.9 is based upon his theory that the Tribes own all the land upon which the dam and powerhouse are situated and, therefore, the Tribes should receive 50 percent of the net benefits. The additional 5.9 percent is related to storage benefits received by the Company from the south half of Flathead Lake, which is owned by the Tribes.

Of the percentages proposed for sharing the benefits, only Staff's use of 25 percent appears to most nearly approximate the land holdings of the Tribes as compared to

(9734)

the Company's, notwithstanding the fact that the record does not disclose with precision the acreage held by each party and, as in the Third Unit case, there is no separation and evaluation of ownership between the Tribes and the Company of the Kerr power site land and the Flathead Lake reservoir land.

As previously stated, the Examiner concluded that the first step in resolving the problem before him was to select a reasonable figure as a readjusted annual charge after considering all the circumstances and then, as a second step, to adopt an acceptable method to support the charge. This procedure, the Examiner feels, is compatible with the Third Unit case where the court, while reluctant to endorse any method of determining the Tribes' share, did find the charge of \$63,375 to be reasonable.

All of the proposals in this proceeding for deriving a readjusted charge through the medium of savings or net benefits are, in the main, reasonable. The departure from this criterion is effected by the excessively high percentage of sharing proposed by some of the witnesses. The Examiner concludes that, as in the Third Unit case, a 25-percent share of the net benefit, as previously determined, is an equitable and reasonable portion of such benefit to be allotted to the Tribes as a readjusted annual charge for the use of tribal lands.

The net benefits as calculated by Witness Shepley are \$3,427,000 of which 25 percent amounts to \$856,750. The Examiner has adjusted this amount to \$850,000 as his determination of a reasonable readjusted annual charge for the ten-year period beginning May 1, 1959.

## 9735

## ADDITIONAL FINDINGS AND CONCLUSIONS

Upon consideration of the entire record herein, the evidence adduced, arguments made and briefs filed, it is found and concluded in addition to the findings and conclusions heretofore set out that:

(1) Project No. 5 was available for operation on May 1, 1939, when the first unit was ready for service.

(2) The power benefit of Project No. 5, as compared to an alternative source of power for the calendar year 1958, is \$3,427,000.

(3) Approximately one-half of the hydroelectric development owned and operated by The Montana Power Company as licensed Project No. 5 is located on lands owned by the Confederated Salish and Kootenai Tribes.

(4) Sharing of the economic advantage or benefit on a ratio of 25 percent to the Tribes and 75 percent to The Montana Power Company is a reasonable method for determining annual charges for the use of tribal lands by Project No. 5.

(5) An annual readjusted charge of \$850,000 for the use by Project No. 5 of lands owned by the Confederated Salish and Kootenai Tribes is a reasonable sum for a period of not less than ten years commencing May 1, 1959.

## ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission on appeal, or review by the Commission on its own motion, as provided in its Rules of Practice and Procedure, that:



(9735)

- (A) Readjusted annual charges for the use of Confederated Salish and Kootenai tribal lands by Project No. 5 are \$850,000 per year.
- (B) Readjusted annual charges for Project No. 5 shall be effective as of May 1, 1959, and shall bear simple interest at the rate of 4 percent per annum from such date.

AMES W. WILLIAMS  
Ames W. Williams  
Presiding Examiner

\* \* \* \* \*

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UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION  
Project No. 5  
Readjustment of Annual Charges  
IN THE MATTER OF  
THE MONTANA POWER COMPANY

Brief by Stewart L. Udall, Secretary of the Interior, Intervenor, Opposing Exceptions of the Montana Power Company to the Decision of the Presiding Examiner Issued August 4, 1966

\* \* \* \* \*

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- 3. The Power of Approval of the Secretary of the Interior Applies Equally to a Determination by Arbitration Under Article 30(D) of the License and a Determination by the Commission Under Section 10(e) of the Act as Amended

The Company contends that its equal position with the Tribes and the Secretary in an arbitration proceeding under article 30(D) of the license is destroyed in a section 10(e) readjustment determination by the Commission, since

(10020)

only the latter is subject to the veto power of the Secretary. The Company concludes that such a substantial change in its position gravely affects its substantive rights and is, therefore, prevented by sections 6 and 28 of the Act and a denial of due

#### 10020

process. Contrary to the Company's erroneous premise, the Secretary's power to approve annual charges for the use of tribal land applies equally to a determination under article 30(D) of the license or under section 10(e) of the Act, as amended.

If the Secretary has veto power over a Commission determination under section 10(e), as amended, it must follow that he retains such power over the decision of an arbitrator. Nowhere in section 10(e) of the 1920 Act or the 1935 Act, as amended, or in article 30(D) of the license is there any mention of the Secretary's power of approval. That power stems from the Act of March 7, 1928 (45 Stat. 200, 212-213), from section 4(e) of the Federal Power Act, as amended (same as section 4(d) of the 1920 Act, 41 Stat. 1065-66), and from other statutes.<sup>4</sup> These statutes have entrusted the Secretary of the Interior with the duty to protect the interest of Indian tribes under his supervision in receiving a fair return for the use of their property. This is an obligation which may not be waived or delegated to others except as provided by Congress. See 36 Ops. Att'y. Gen. 98 (1929).

The basis of the Secretary's veto power is his special statutory responsibility, independent of section 10(e) of the Federal Power Act. Accordingly, the Secretary's re-

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<sup>4</sup> See, e.g., Act of June 30, 1834, Rev. Stats. § 2116, 25 U.S.C. 177; Act of March 3, 1909, 35 Stat. 797; Act of June 25, 1910, 36 Stat. 858; Rev. Stats. § 463, 25 U.S.C. § 2.

(10020)

responsibilities to the Indian tribes remain the same, regardless of who readjusts annual charges for

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the use of tribal lands. If, as the Company contends, the arbitration provision of article 30(D) represents an attempt by the Secretary to redelegate his responsibility, it is a nullity.

The only interpretation of article 30(D) of the license consistent with the Secretary's independent responsibilities to protect Indian tribal property is to read such article in conjunction with article 41 of the license for Project No. 5 (Item A). Pursuant to article 41, any change in the license which may affect the interest of the Indians shall be subject to the approval of the Secretary of the Interior. Article 41, therefore, incorporates in the license the Secretary's trust responsibility over tribal property. If the Secretary considered a readjustment by an arbitrator to be inequitable to the Indians, he would be required to veto it. Otherwise, he would fail in performing his fiduciary responsibility. See *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935).

It is clear that substitution of the Commission for an arbitrator as the forum in a readjustment proceeding does not change the position of the Company vis-a-vis the Secretary.

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UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

ANNUAL CHARGES

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

PROJECT No. 5

THE MONTANA POWER COMPANY

Opinion No. 529

Opinion and Order Readjusting Annual Charges

(Issued October 4, 1967)

Ross, Commissioner:

This matter is before us pursuant to the filing, on May 19, 1959, of a petition by the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes) to readjust the annual charges paid by the Montana Power Company (Montana Power) for the use of tribal lands used in the Kerr Hydroelectric Development, Project No. 5, in accordance with Section 10(e) of the Federal Power Act and Article 30 (D) of the project license.

Following a hearing, Examiner Ames W. Williams issued his decision finding that Montana Power should increase its annual charges to the Tribes from \$238,375 to \$850,000 annually. The three parties—Tribes, Montana Power, and the Secretary of Interior (Secretary) and

(10059)

Staff filed exceptions to the Examiner's decision which raise the following issues:

1. Whether the Commission has jurisdiction to establish annual charges under Section 10(e) of the Federal Power Act as opposed to arbitration.

2. The exact date of expiration of the initial twenty-year period of commercial operation of Project

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- 2 No. 5 and whether the readjusted charge should be made retroactive to this date.

3. Whether the readjustment of charges should include the third unit of the current installation.

4. The determination of the readjusted charge. This includes the consideration of net benefits or profitability or some other method of computation and, after that, a consideration of what share the Tribes should have in such net benefits or profitability.

5. The appropriate interest rate on any increased annual charges.

We hold that: (1) The Commission has jurisdiction under Section 10(e) of the Act to readjust annual charges; (2) the project was available for and began commercial operations on May 20, 1939; (3) the readjusted annual charges should be effective 20 years from May 20, 1939; (4) the readjustment should include the third unit of the current installation; (5) the readjusted annual charge is \$950,000 with simple interest at 6 percent.

In large measure, the Examiner reached the same conclusions and we are adopting his decision to the extent consistent with this opinion.

*Background*

Project No. 5, which has an installed capacity of 168,000 kilowatts, is located on Flathead River and Flathead Lake about five miles downstream from Poulson, in Flathead and Lake Counties, Montana. Flathead Lake serves as the project reservoir.

Pursuant to the Hell Gate Treaty of July 16, 1855, (12 Stat. 975), the Tribes own the lands underlying the southern half of the lake and the lands occupied by the dam and powerhouse.

**10061**

3 Kerr Dam is a variable radius concrete arch, 381 feet long and 200 feet high, with a radius of 179 feet at the top. The storage capacity of Flathead Lake between elevations 2883 and 2893 feet is 1,217,000 acre feet. The installation has three generating units, the first and second of which are 77,000 horsepower and were placed in service on May 20, 1939, and May 31, 1949, respectively. The third unit, a 78,000 horsepower turbine, came on the line December 5, 1954.

The Commission issued the original license for the Kerr Project on May 23, 1930, for a term of fifty years pursuant to the Federal Water Power Act (41 Stat. 1063, 16 U.S.C. 791-823).<sup>1</sup> The licensee did not complete construction within the period prescribed by the license. When it applied for an amendment to extend the time, the Secretary opposed the application and the matter was referred to the Attorney General. Section 10(e) was thereafter amended as part of the 1935 amendments to the Federal Water Power Act, and the Tribes were organized. Subsequently,

<sup>1</sup> A special act of March 7, 1928, 45 Stat. 200, 212-213, authorized the Commission to issue a license for the use of lands within the Flathead Indian Reservation "upon terms satisfactory to the Secretary of Interior."

(10061)

the Secretary consented to the amendment of the license which was granted by the Commission on June 23, 1936.

Section 10(e) of the Federal Power Act, as amended, authorizes the readjustment of annual charges for the use of Indian lands after the development has been available for service for twenty years and thereafter at intervals of not less than ten years. The annual charges as originally fixed by the Commission and supplemented by the Commission's decision involving the installation of the third turbine in 1954 presently amount to \$238,375.

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4       The Tribes petitioned for readjustment on May 19, 1959, but no action was taken thereon because a proceeding was then pending with respect to the fixing of annual charges for the third unit. That matter was finally determined on January 25, 1962, in the case of *Montana Power Company v. F.P.C.*, 298 F.2d 335.

We thereafter set this matter for hearing upon failure of the parties to negotiate a mutually satisfactory readjustment of the annual charges.

#### JURISDICTION OF FPC

Shortly before hearings commenced the Company sought to stay the proceeding and to compel compliance with the arbitration provision of Article 30 (D) of the license by filing a petition in the U. S. District Court for the District of Montana, Butte Division. The Court, however, dismissed the action forthwith, stating that the exclusive jurisdiction to determine the issue lies with the Federal Power Commission and the Court of Appeals under Section 313(b) of the Federal Power Act (16 U.S.C. 8251).

In setting the hearing in this case, the Commission recognized as a question of law the contention of the

(10063)

Company that the Commission lacks the jurisdiction to hear the dispute and permitted argument and the presentation of briefs upon this basic issue.

Section 30 (D) of the subject license, which was issued on May 23, 1930, provides:

*The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operation under this license and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission, and the*

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- 5 *Secretary of the Interior can not agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in "The United States Arbitration Act," (U.S.C., Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development. (Emphasis added.)*

This license was issued under the Federal Water Power Act, Section 10(e) of which, in pertinent part, read as follows:

... (W)hen licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after



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the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license.

The Act of August 26, 1935, amended Section 10(e) in relevant part as follows:

. . . (W)hen licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, *subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16*

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- 6     *of the Act of June 18, 1934 (48 Stat. 984), fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing . . . (Emphasis added.)*

Montana Power contends that Article 30(D) of the License calling for arbitration of readjustment of charges confers a substantive right upon it and asserts that this is confirmed by Section 28 of the Federal Power Act which provides that "no . . . amendment . . . shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder." Hence, Montana Power claims that it is not affected by the changes in Section 10(e) in the 1935 Act which provides that the "Commission shall . . . fix a reasonable annual charge . . . and such charges may . . . be readjusted by the Commission

...” Rather, it argues, it is governed by the provision of the original Section 10(e) which provided that readjustment of annual charges be made in the manner described in each license.

The Commission must determine whether arbitration controls the method of adjustment, or whether Section 10(e) controls it.

If Section 30(D) of the License confers a substantive right on the Licensee that right is expressly reserved by Section 28 of the Federal Power Act. If, however, the method of determination of annual fees is procedural rather than substantive in nature, then Congress may from time to time describe or change that procedure without abrogating constitutional rights.

The substantive right conferred by Section 30(D) of the license consists of the expression of the criterion

#### 10065

7 for the readjustment of the annual charge, to wit, “upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development.” But that criterion will govern irrespective of the procedure employed for its application. Thus, it is apparent that the procedural alteration prescribed by Congress does not work any substantive change. Whatever the procedure employed, the final result must be the establishment of a reasonable annual charge.<sup>2</sup> Certainly it was not unreasonable for Congress to conclude that the application of this substantive standard, one which requires intimate familiarity with the technical operations of hydroelectric developments, could better be applied by a commission with established expertise than by arbitrator who could at best enjoy

<sup>2</sup> 298 F.2d 335, 340 (CA-DC 1962).

(10065)

but ad hoc familiarity with the underlying technical and legal complexities.

Arbitration by reason of its inherent nature is a procedural process, namely: a means, mechanism or device by which differences may be adjusted, reconciled or settled. The 1935 amendment of Section 10(e), by providing a hearing procedure before the Commission, obviously did not predetermine or deprive the Company of a reasonable means of determining a readjustment of annual charges. In addition to allowing the opportunity for a hearing, the 1935 amendment furnished the license with a facility for obtaining judicial review of the resulting determination.

The cases support this conclusion. Particularly in point is *Pennsylvania Power & Light Company v. F.P.C.*, 139 F.2d 445 (3d Cir. 1943), *cert. denied*, 321 U.S. 798 (1944), wherein it was contended that Section 14 of the Water Power Act, providing for a determination of net

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8 investment by a district court if the Commission and licensee disagreed, was a substantive right and, therefore, unaffected by the 1935 amendment of such sections of the Act which provided for a determination of the issue by the Commission. The court stated, in material part, at page 453:

The licensee had no vested right to have its investment determined by one procedure rather than another at least so long as it was accorded a right to be heard and an ultimate judicial review. Accordingly the change of procedure which the 1935 amendment brought about did not, as applied to the present proceeding, violate the Fifth Amendment.

Also, in *Safe Harbor Water Power Corp.*, 5 FPC 221 (1946), *aff'd* 179 F.2d 179 (3d Cir. 1949), *cert. denied*,

339 U.S. 957 (1950), a licensee under the Water Power Act contended that any enlargement of Commission jurisdiction by reason of the enactment of Part II of the Federal Power Act was invalid because Section 28 precluded the alteration of a license without the consent of the licensee.<sup>3</sup> The Commission, in deciding the issue, rejected the contention at page 243:

One other contention advanced by Safe Harbor in regard to jurisdiction should be noticed. Safe Harbor contends that it cannot be regulated under any provisions other than those in Section 20, because it construes its license to be a contract, and argues that the effect of Section 28, which saves outstanding licenses from alteration, together with its license, issued subject to the provisions of the Federal Water Power Act of 1920,

#### 10067

- 9 is to protect the license from alteration by Congress without Safe Harbor's consent. It does not contend that the rate fixed by this Commission under Section 20 would be any different from that fixed under Part II. Safe Harbor's objection, then, amounts to no more than that Congress is without power to substitute determination by one agency, for that by another. The alteration opposed here is one of procedure, and procedural changes may be effected without consent of the "licensee."

*Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437 (1903), involved a change of procedures for enforcement of the rights of the contract after the contract was entered

<sup>3</sup> Under Section 20 of the Federal Water Power Act the states could regulate the wholesale rates of hydroelectric licensees whereas the FPC was granted exclusive wholesale rate jurisdiction in Part II of the Federal Power Act.

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into. The Court there pointed out that the legislature may not withdraw all remedies and thus, in effect, destroy the contract. Nor may it impose new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as was established when the contract was made. The Court held, however, that the legislature may modify or change existing remedies or procedures without impairing the obligation of contract, provided that a substantial and efficacious remedy remains or is given by which means the party can enforce his rights under the contract.

We find that Congress by amending Section 10(e) did nothing more than change a procedure while retaining a substantial and efficacious remedy protecting the rights of the parties insofar as annual charges are concerned. Indeed, Congress materially improved the rights of the parties in the determination of a fair and reasonable charge by the amendment to Section 10(e). The parties now have the right to have an official record of the proceedings. They obtained the right to cross-examination. They obtained the right to rebuttal. They obtained the right to file exceptions. They obtained the right to apply for a rehearing if aggrieved.

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### WHEN READJUSTMENT OF CHARGES MAY BE EFFECTED

Section 10(e) of the Federal Water Power Act and Article 30(D) of the Kerr License provide for readjustment of annual charges for the use of Indian lands "at the end of twenty years after the beginning of operations" and "at the end of twenty (20) years after the beginning of operation under the license," respectively. In Section 10(e) of the Federal Power Act, as amended, the phrase

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was altered to read "at the end of twenty years after the project is available for service."

In a proceeding to determine the actual legitimate original cost of the project, including the amount of interest during construction, this Commission by order dated March 30, 1948 (7 FPC 528, 530) determined that interest costs would be deemed to have terminated on August 1, 1938, when Project No. 5 "was placed in commercial operation . . ." The record indicates that the August 1, 1938, date was utilized for a limited accounting purpose relating primarily to the termination of interest charges and that it has no direct bearing upon the commencement of commercial operations.

Commencing on October 2, 1938, 1,103,000 kwh were generated during a three-day period, but that date does not appear to be either the date marking the beginning of commercial operations or when the project became available for service. This generation amounted to only a test run and generation was terminated. During this period, Montana Power experienced trouble with a circuit breaker. Additionally, other technical adjustments were required. No further power was generated until May, 1939 when the project began commercial operations. As noted in the third unit case, "The first of the two units was placed in operation May 20, 1939 . . ." 298 F.2d 335, 336.

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11        There is no convincing evidence indicating that Montana Power failed to commence the operation of this particularly efficient project as soon as it was ready. We therefore find that the project began commercial operations when it was available and that May 20, 1939, is the operative date under Section 10(e). This conclusion finds support in the fact that, in accordance with the schedule of charges, the charge accelerated on June 1, 1939,

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the first full month after the commencement of operations, from \$1,000 to \$5,000 a month. Further, the Tribes, apparently relying on the same date as subsequently found by the Circuit Court, filed their petition for readjustment of annual charges on May 19, 1959, it being the conclusion of twenty years commencing May 20, 1939.

The date when the project began commercial operations and hence when twenty years shall have expired becomes important only if the annual charge is to be readjusted and only if it is to be readjusted effective with the expiration of the first twenty years.

Montana Power asserts that if the annual charge is to be readjusted, it is to become effective beginning with the determination and the readjustment can have no retroactive effect. Montana Power alleges that the Tribes were dilatory in waiting until the very end of the twentieth year before petitioning for readjustment.

We are not persuaded by Montana Power's contentions. Section 10(e) of both the Federal Water Power Act and the Federal Power Act contemplated that annual charges may be readjusted after twenty years. To hold that no readjusted charge could become effective until promulgated after

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12 appropriate hearing not only would encourage litigation but would place a premium on delay, dilatory tactics and protraction of that litigation. The purpose of Section 10(e) both of the Federal Water Power Act and the Federal Power Act was to provide that the Indian proprietors of the land would be compensated for use of their lands by reasonable rentals thereon. It would be grossly inequitable to allow a tenant to occupy premises during a dispute over the establishment of a fair and reasonable rental charge if such charge were not effective

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during the full period of the dispute. The owner is entitled to his proper rental for the period of occupancy although the final determination as to the proper amount may not be reached until long afterward. Indeed, it is not difficult to imagine a situation where the final determination may not be reached until after the premises have been vacated. The logical extension of Montana Power's argument is that the owner would be entitled to no readjusted rents in that case.

Montana Power's argument that it would be irreparably injured by a retroactive determination is not convincing. Montana Power had available the obvious and normal practice of making adequate provision for possible increased payments by maintaining a reserve account. It chose not to avail itself of this practice but instead used the money in its normal operations. It should not now be excused from making proper payments because of its own failures.

Where, as here, the claim for readjustment is made contemporaneous with the expiration of the statutory period, we conclude that the statute contemplates that any readjustment ultimately determined becomes effective upon the date which marks the completion of the first twenty years after the project is available for service.

#### INTEREST

We further conclude that Montana Power should pay interest on the difference between the rent it actually

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13     paid and that rent we have found to be fair and reasonable herein. That rate of interest is reasonably and properly six percent simple interest per annum, which rate is in accord with other holdings of this Commission in closely analogous situations, *Wisconsin and*



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*Michigan Power Company*, Opinion No. 432, 31 FPC 1445, 1462.

In determining that interest shall be paid at six percent we are aware that in the third unit proceeding (25 FPC at 224) we provided, without explanation, that interest should be paid at the rate of four percent per annum. We are not bound by that decision. Based upon our consideration of the arguments advanced here we find that to perpetuate that unrealistically low interest rate would unjustly enrich Montana Power at the expense of the Tribes. Accordingly, we find that equity requires selection of a rate of interest which more closely approximates the prevailing commercial rate of return, i.e., 6 percent.

#### THE THIRD UNIT ISSUE

Whether the rent assessed by reason of the construction of the third unit is to be deemed separate and distinct from the rentals assessed against the first two units constitutes a separate issue. If separate and distinct, the rental for the third unit would remain for twenty years from December 1, 1954, and any readjustment would be limited as of May 20, 1959, to the first two units. The resolution of this issue rests on whether rents are to be applied to a project or to project works. In the third unit case, Montana Power took the position that rents are applicable to a project, that only a single project exists since only a single license has ever been issued for Project No. 5, that rents were fixed at the beginning of such project which could not be readjusted before the expiration of twenty years from that beginning and that the rentals must be deemed to have covered the third unit.

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- 14        The company now contends that having found a separate and additional rental due by reason of the

third unit, it must be deemed a separate part for the purposes of readjustment.

A "project" is defined in Section 3(11) of the Act as a "complete unit of improvement or development." On the other hand, Section 3(12) of the Act defines "project works" as "the physical structures of a project." Section 4(e) of the Act empowers the Commission to license the construction, operation and maintenance of water power "project works"; it does not authorize the licensing of "projects" as such.

The Commission does not necessarily license all the project works of a given project at one time. It may, as in Project No. 5, grant authority for the installation, operation and maintenance of certain project works upon prescribed conditions as to construction and payments; but such a license does not cover additional works, as Montana recognized by applying for the licensing of the third unit.

All three units are part of Project No. 5—all have been constructed pursuant to the license of May 23, 1930, as amended.

Section 10(e) says that readjustment may be made at the end of twenty years after the project is available for service. There is one project here. It became available for service on May 20, 1939, although a second unit did not come on stream until 1949 and a third unit not until 1954. To assert that readjustments are applicable in separate years is to assert separate licenses, separate projects. There are separate project works but there are no separate licenses; there are no separate projects.<sup>4</sup>

In *Arkansas Power & Light Company*, Project No. 271, 26 FPC 549, the Commission rejected a piecemeal approach

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<sup>4</sup> See, for example *Montana Power Co.*, 15 FPC 1330, 1335.

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as urged by the Company, with respect to a Section 10(d) determination (amortization reserves) stating:

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- 15 . . . In any event, the provisions of Section 10(d) apply to the project defined in the license as distinguished from some specified part thereof. Consequently, the amortization reserve period can commence only once with respect to the project defined in the license for Project No. 271, the application will be denied.

*sting* ( The most reasonable conclusion is that the readjustment of annual charges should be undertaken for the project in its entirety and not with respect to the time each generator began commercial operations. The logic of Montana Power's argument requires separate determinations of the rentals applicable to the first and second units, which were placed in service ten years apart. Not even Montana Power contends these two units comprise separate projects.

#### READJUSTMENT OF ANNUAL CHARGES

Section 10(e) of the Federal Power Act provides that the Commission shall "fix a reasonable charge for the use thereof" . . . and Section 30(D) of the License provides reasonable charges shall be fixed upon the basis of "the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development."

Montana Power argues that the Commission should be limited in its determination of reasonable annual charges to modifying the annual charges previously determined to reflect any changed circumstances. We do not agree. Nothing in Section 10(e) of the Federal Power Act or in the Kerr license suggests such a limitation. These sources

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provide two broad standards: one, that the charges be based on the commercial value of the lands for the most profitable purpose; and second, that they

10074

16 be reasonable. In our opinion the reasonable commercial value of the land cannot be determined by considering individual factors in isolation. Instead, in fairness to all parties the entire analysis must be made *de novo*. This, it should be noted, is the established practice in rate cases followed by this, and most other regulatory agencies.

Montana Power's argument that such a procedure amounts to changing the rules in midstream cannot be adopted, for Congress has directed us in Section 10(e) of the Act to readjust annual charges. And Congress has given us a broad standard—that of reasonableness—as a guide. Essentially, Montana Power is complaining about the requirements of the statute. Such a complaint is properly directed to Congress, not to this agency.

Of course it cannot be assumed that a reasonable charge, once established, will remain the appropriate charge indefinitely. Indeed, it is precisely because the rental value of land will vary that the statute and license provide for its readjustment in order to assure that the Licensee will not be unjustly enriched at the expense of the tribal owners. Obviously the parties did their best to set an initial charge—but all recognized that the charge set would not be binding for the life of the license.

While it is true that an annual charge cannot be viewed as immutable, it is equally clear that a prescribed charge will continue as the lawful charge under Section 10(e) until demonstrated to be inappropriate. Therefore, while under the statute we could readjust the annual charge once again to be effective May 20, 1969, such a readjustment will

(10074)

(be made only if it is demonstrated that the charge here set is inappropriate. In view of the proximity of our conclusion here with the expiration of the present statutory period, we expect that the annual charge here fixed will remain the appropriate charge for a reasonable period beyond May 20, 1969, the earliest date on which a further readjustment could be made effective.

10075

17 This brings us to the readjustment of the annual charges. Each party and Staff proposed at least one computation, the end results of which range from a low of \$248,102 annually, advocated by Montana Power's witness Woy, to a high of \$1,667,000 recommended by the Secretary's witness Mohler. With minor exceptions, all of the parties approached the problem in two parts. First, they computed the annual commercial value of the Kerr project. Second, they allocated a portion of this value to the Tribes based on the Tribes' ownership of lands and waters associated with the project. The portion so allocated to the Tribes was the annual rental they recommend we assess. A graphic summary of the methods and results advocated by the parties follows:

Project Benefits		Allocated to Tribes	
Examiner	Dollars	Percent	Dollars
			Method
			Method
Staff A	3,427,000	25%	850,000
Staff B	2,529,000	"	857,000
Staff C	2,550,400	"	611,250
Van Scoyoc (Tribes)	2,254,000	"	632,350
Spooreen (Tribes)	2,474,000	57.54	1,300,000
Mohler (Secretary)	2,981,666	42.13	1,150,000
Woy 1 (Montana)	—	55.9	1,667,000
Woy 2	—	—	248,102
Woy 3	1,410,000	—	263,830
Seymour (Montana)	add 154,000 to previously determined benefits	25	352,500
		"	270,000

(10077)

10077

19 As shown above Staff, Sporseen, and Mohler advocated the "net benefits" approach in computing the annual commercial value of the project. Under this method, the value of a project is determined by figuring the cost of providing an amount of energy equivalent to that provided by the project by the most likely alternative at the time the project was constructed. The amount by which the costs of an alternative source (or sources) exceeds the costs of the subject project is said to be the "net benefits" of the project. Van Scoyoc's profitability method consists of a detailed study of the revenues attributable to the Kerr project for the years 1958 through 1964. The study embraces that share of the Company's total electric revenues reasonably attributed to Kerr together with a determination of the annual costs of producing power at Project No. 5, including a reasonable return on the net investment of the Company in the facilities used in the generation of such power. The annual costs deducted from the annual revenues according to the witness, reflect the actual commercial value of the Kerr site or the profitability of the development to the Company.

The above two methods, as the Examiner observed, are the two principal techniques utilized in this proceeding for determining the value of the Kerr site.<sup>5</sup>

Finally, witness Seymour offered a computation comprising the existing annual charge, modified to reflect known changes.

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<sup>5</sup> Montana Power initially argued for two methods: one based on the Pelton-Round Butte formula, and a second based on the Commission's formula for the determination of reimbursement to the United States for administrative costs. However, the Examiner properly rejected these methods as inapplicable here, and Montana Power has not pursued these arguments. It is therefore unnecessary to treat them further.

## 10078

20 The decision in the Third Unit case constitutes the only precedent in this area.<sup>6</sup> And that offers little in the way of concrete criteria. In appraising the Commission's determination of annual charges, the Court said:

The annual charges shall be reasonable, Section 10(e) says, and must be approved by the Secretary of the Interior and the Indians themselves; otherwise, the statute is silent as to how Indian rentals shall be computed. So the only question is whether the rental fixed by the Commission is reasonable.

\* \* \*

Whether the Commission properly adopted and correctly applied the "Sharing of Net Benefits" method of computing the additional payment is not the question. The question is, rather, whether the end result is a reasonable one, as the statute requires it to be.

After spending considerable time over the various methods advanced, it becomes quite evident why Congress, the Court, previous Commissions and Examiners, and the Examiner herein are exceedingly general in their expressions on the subject. It also explains why the parties appeared most reluctant to discuss this particular issue at the oral argument, notwithstanding that this was the most difficult and most important issue. There is no one right method—all the others being totally wrong. Rather, there is a logic and rationality supporting most of the computations, but also obvious shortcomings.

*Brandeis  
quote*

## 10079

21 We have decided that annual charges of \$950,000 are reasonable within the meaning of Section 10(e) of the Federal Power Act for the following reasons.

<sup>6</sup> *Montana Power Co. v. F.P.C.*, *supra*.



(10079)

After considering the various methods for computing the value of the project we adopt Van Scoyoc's method as the one which most conforms to the statutory intent. This is the only method which ascertains the value of the Kerr project for the most profitable purpose for which the Tribal lands are used, which all parties agree is for power production. We agree with the Examiner's observation that: "Mr. Van Scoyoc's analysis provides a realistic and impressive demonstration of the profitability of Project No. 5 . . ." While the Examiner was concerned with the complexity and the uncertain allocations involved, *no party* has excepted to the manner in which this analysis was performed, and we believe from our independent scrutiny that the method was implemented in a reasonable manner. Moreover, while this method involves judgment factors, it has the advantage over the net benefits approach in that it is directly concerned with the actual operation of the project being considered and does not depend on such speculative aspects of the net benefits theory, as, for example, what alternative project the company would have constructed, a subject on which there is considerable debate, whether to use trended costs, or the appropriate level of coal costs for an alternative steam plant.

The examiner criticizes the profitability method as a form of profit sharing not contemplated or intended by the parties, and appeared to reject the method for that reason. Along these lines, Staff argues that the annual charge could be nothing under this concept if the project were unprofitable. We disagree on two grounds. First, the parties by the very terms of Article 30(D) of the License in readjusting charges spoke in terms of fixing them "upon the basis provided in Section 5 of Regulation

## 10080

22 14 of the Commission<sup>7</sup>, to wit, upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development." It seems to us that a form of profit sharing was indeed contemplated or, at the very least, reasonably within the scope of the language.

Second, this method does not mean that the Tribes are completely dependent upon how Montana Power operates the project. In this case, there is no evidence or contention that the company operated the project other than in the most economical manner. If such a contention were made and proved, annual charges in that event would not be based on the actual use of the project.

In addition to our previously expressed objections to witness Seymour's approach, we agree with the Examiner's criticism that it inconsistently relies on the results of the third unit proceeding, which utilized the net benefits method; yet at the same time, the approach essentially rejects using the net benefits method.<sup>8</sup>

## 10081

23 This brings us to considering the appropriate percentage of the commercial value of the Kerr

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<sup>7</sup> Sec. 5. When licenses are issued involving the use of tribal lands embraced within Indian reservations, the commission will fix a reasonable annual charge for the use thereof, based upon the commercial value of the land for the most profitable purpose for which suitable, including power development. The charge shall commence upon date license is issued.

<sup>8</sup> We, of course, recognize that the net benefits method has been used, at least in some fashion, in prior determinations. As among these variations, but without recounting the merits and demerits of each of the several variations advanced, we believe that Staff's C computation of \$2,550,400, which approximates Sporseen's \$2,474,000, to be the most reasonable based on our analysis of the record. In the absence of the Van Scoyoc method which we consider more reliable, we would be persuaded that the commercial value of the Kerr project approximates \$2,500,000.

(10081)

project which should be allocated to the Tribes by virtue of the ownership of related lands and waters. Similar to the figures in the first step, there are widely varying recommendations ranging from 25 percent by Staff, Woy and Seymour to 57.53 percent by Van Scoyoc.

Before describing the various methods, it is helpful to understand the three factors accounting for the value of the Kerr project. These three factors are the dam site (owned by the Tribes), Flathead Lake (the proprietary interest in which is equally divided between the Tribes and Montana Power), and releases from Hungry Horse, (respecting which neither Montana Power nor the Tribes have any proprietary interest). During critical water conditions, Kerr generation totals 1069 MW months: 161 MW months by natural stream flow, i.e., the dam site; 251 MW months by Flathead Lake storage; and 657 MW months by Hungry Horse storage.

The method used by Staff (which also forms a part of certain of the recommendations of other parties) is denominated as the sharing of net benefits method. This method assigns 50 percent of the net project benefits to the ownership of the power site and 50 percent to the developer for taking the risks associated with developing the site. The dam site and Flathead Lake are considered as a unit. Since the Tribes own one-half of Flathead Lake, their portion is said to be one-half of one-half, or 25 percent of the net benefits. This was the method nominally followed by the Commission in the third unit case.

Three other methods have been suggested. Mohler began by assuming that the benefits should be apportioned based on the ownership of land and water. Since the Tribes own the land on which the project is located, he assigned the entire 50 percent attributable to land to the Tribes. He then determined that Flathead Lake

## 10082

24 represented 23.5 percent of the value of the project which is attributable to water. The Tribes' allocable portion of this 23.5 percent is 5.7 percent. This was derived by dividing 23.5 percent by one-half since Flathead was assumed to be on the water side of the equation, with another 50 percent reduction to reflect the Tribes one-half ownership of the lake.

Van Scoyoc also attempted to weigh the contribution of tribal lands and water with nontribal lands and waters based on critical water conditions. Because the Tribes own 100 percent of the dam site, they are assigned 100 percent of the natural stream flow. Since the ownership of Flathead Lake is equally divided, he assigned 50 percent of the power value of Flathead to the Tribes. Finally, he divided Hungry Horse releases 50-50 because they flowed into Flathead Lake. To summarize graphically:

	MW Months		Tribes' Share	
Kerr Plant Site	161	x	1.00	= 161.0
Flathead Lake	251	x	.50	= 125.5
Hungry Horse	657	x	.50	= 328.5
	<hr/> 1069			<hr/> 615.0
	615	= .5753 or 57.53%		
	<hr/> 1069			

Sporseen's approach is similar to the sharing of the net benefits in that it does not lump land and water rights. Sporseen attributed water rights to the Company on the basis of its proprietary interest, and land rights to the Tribes and Montana Power on the basis of their respective interests thereto. Like Van Scoyoc and Mohler, the basis of his computations is Kerr generation under critical water conditions. He segregated Flathead Lake from Kerr generation. The value of Kerr without Flathead is 818 MW

(10082)

months (161 MW months natural stream flow and 657 MW months from Hungry Horse), i.e., 68.5 percent of the total. The Tribes' share, based on 50-50 division between land and water is 34.25 percent. To this must be added one-half

10083

25 the value of Flathead; 50-50 split between land and water with a further 50-50 split to reflect the ownership of one-half of the lands. One-fourth of Flathead's power value of 376 MW months<sup>9</sup> or 31.3 percent of total Kerr is nearly 8 percent which, when added to the above-mentioned 34.23 percent produces his result of 42.13 percent.

According to the proponents, the sharing of the net benefits has the advantage of having been used before. In our view, there is very little else to be said in its favor. Indeed, Staff's briefs are almost silent on this issue. It is true this method was allegedly used in the third unit case. However, the Examiner's decision therein casts considerable doubt on that proposition (25 FPC 225, 229). Moreover, the use of that method was based on the Commission's use of it in determining annual charges a licensee should pay for sharing a government dam.<sup>10</sup> As Staff conceded at the oral argument, there is a world of difference between the government in such a situation and the Tribes here. The government maintains control over the dam and its project works. It continues to derive benefits from them. In contrast, the Tribes are completely without the use of these lands and derive no benefit other than the annual charges we assess. The reviewing Court apparently was not overly impressed with this method

<sup>9</sup> He multiplied the value of Flathead by 1.5 to reflect its importance to Hungry Horse releases.

<sup>10</sup> *Kanawha Valley Power Co.*, Project No. 1290, Item F.

for it sustained the Commission on the basis of the end result—not the methodology.

#### 10084

26        There are further objections. Staff's method assigns 50 percent of the net value to the developer. Since we are using Van Scoyoc's profitability method, Montana Power's risks, such as they are, are fully reflected in the rate of return element of project costs which were deducted from the project revenues in determining the project's net benefits. Additionally, this method lumps the values attributable to natural stream flow, Flathead Lake and Hungry Horse, and fails to weigh the interests of each party in these three principal contributors to the Kerr Project.

The Secretary has shown the strange and illogical results this method can produce by applying it to other situations. (1) If the Tribes own all of the land underlying the generating site and lake bed, they receive half of the net benefits, and the Company receives half; (2) if, as in this case, the Tribes own all of the generating site land and half of the lake bed, they receive 25 percent of the net benefits and the Company, 75 percent; (3) if the Tribes own all of the generating site lands but none of the lake bed, they receive one percent of the net benefits, while the Company receives 99 percent; (4) if the Tribes own none of the generating site lands but half of the lake bed, they receive 24 percent of the net benefits and the Company, 76 percent; and (5) if the Tribes own none of the land underlying the generating site but all of the lake bed, they receive about 49 percent of the net benefits and the Company, 51 percent.

In none of the situations described above does the Company own any land within the project. Yet it may receive from 50 percent to 99 percent of the net benefits. In the

(10084)

first three situations the Tribes own all the land underlying the dam and powerhouse. Yet they may receive from one percent to 50 percent of the net benefits. But in the last two situations, even though they own none of the power site lands, the Tribes may receive from 24 percent to 49 percent of the net benefits. The unreasonableness, inconsistency, and inequity of these

10085

27     divers results are directly attributable to the failure in the method employed to properly distinguish between land underlying the dam and powerhouse and land underlying the lake bed.

With one exception, we believe Montana Power has expressed the most appropriate concept for making the allocation in its brief opposing exceptions. It there criticizes the allocations of Mohler as conceptually wrong because power value requires an inseparable combination of both land and water. The same criticism is also applicable to Van Scoyoc's method, at least insofar as it allocates the value of the dam site exclusively to the Tribes. Montana Power states: "If the combination of land and water is to be used as a basis for sharing a net benefit, some grouping of land ownership and water associated with that land ownership must be made."

This is precisely what Sporseen has done, and we believe his method to be the most reasonable of those advanced in this proceeding. The only difference between what Sporseen did and what Montana Power argues relates to Hungry Horse. Sporseen included it. Montana Power would not, on the basis that none of the land required to develop Hungry Horse storage is owned by the Indians and because headwater payments are made by the licensee. Regarding the latter, headwater payments were deducted in computing the benefits, so that point is not

(10086)

meritorious. Regarding the former, we think Hungry Horse should be included because the value of a parcel of realty depends not only on its intrinsic worth, but also upon its location relative to other realty. Thus, land adjacent to the intersection of two interstate freeways is more valuable for commercial purposes than an identical parcel of property on a little used secondary road. And the property on which Kerr is located is similarly more valuable by reason of its location relative to Hungry Horse. To close our eyes to Hungry Horse would be to fail to recognize the value of Kerr.

10086

28 Accordingly we adopt Sporseen's 42.13 percent allocation figure which, when applied to Van Scoyoc's computation of profitability of \$2,254,286 produces annual charges of \$949,731, which we will round off to \$950,000.00.

We consider this end result reasonable. It is certainly much closer to reality than the existing annual charges of \$238,375, or the charges Montana Power recommends herein. The Secretary showed the relationship of the present charges to Montana Power's electric revenues:

ANNUAL CHARGES AS %  
OF TOTAL ELECTRIC  
REVENUE OF MONTANA  
POWER COMPANY

\$238,375

YEAR	ELECTRIC REVENUE	WOY
1959	\$31,382,095	0.745%
1960	33,651,530	0.695%
1961	35,319,552	0.662%
1962	37,301,369	0.627%
1963	37,395,371	0.625%
1964	39,301,704	0.595%



(10086)

Kerr represents 35.75% of the Company's total installed generating capacity. In critical water years it supplies approximately 40 percent of the Company's total hydroelectric capability. The estimated annual generation at Kerr is 32.05 percent of the Company's total hydroelectric generation during median years. Kerr contributed 30.53 percent of the Company's total hydroelectric net generation during 1958-64. During 1958-64 Kerr contributed approximately 25 percent of the Company's total system resources to the earning of its revenues. In light of the above, the Company's proposals are not reasonable after giving appropriate weight to the Company's transmission distribution and other expenses.

10087

29 *The Commission further finds:*

That the decision of the Presiding Examiner should be adopted to the extent consistent with this opinion.

*The Commission orders:*

- (A) Readjusted annual charges for the use of Confederated Salish and Kootenai tribal lands by Project No. 5 are \$950,000 per year.
- (B) Readjusted annual charges for Project No. 5 shall be effective as of May 20, 1959, and shall bear simple interest at the rate of 6 percent per annum from such date.

By the Commission. Commissioner Carver concurring  
filed a separate statement appended hereto.

(SEAL)

GORDON M. GRANT,  
*Secretary.*

## 10088

1

## The Montana Power Company

## Project No. 5

(Issued October 4, 1967)

CARVER, Commissioner, *concurring*:

The Secretary of the Interior, when he initially intervened in this case, asserted a position not subsequently withdrawn, and not dealt with either by the Examiner or by the Commission. That position was that there inhered in the Secretary the right to reject a determination made by this Commission in these proceedings, in other words to "veto" it.

As originally articulated to the Examiner, the Secretary's position was that he "has both a duty and a right to approve any readjustments of annual charges ordered by the Federal Power Commission. . . This veto power is based upon general and specific statutes and is expressly preserved in the terms of the license . . . [P]articipation [in these proceedings] shall not be construed as abandonment of the Secretary's ultimate power [of] approval over such readjusted charge as may be ordered by the Commission."<sup>1</sup>

In another document, the Secretary "reaffirm[ed] his intention to participate . . . in full compliance with the Commission's rules and regulations . . . [a]fter, however, the proceeding has reached its conclusion, *including the exhaustion of appellate procedures*, the Secretary then has a responsibility to determine whether the Commission's findings should be accepted or rejected."<sup>2</sup> (Emphasis added.)

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<sup>1</sup> Tr. 73.

<sup>2</sup> "Objection and Answer of Secretary of the Interior Stewart L. Udall to Montana Power Company's Motion for Issuance and Subpoena," dated and filed October 22, 1965, pp. 4-5.

(10088)

Essentially the same position was restated in oral argument at Tr. 1561-1571 and Tr. 1585-1586.

The Secretary's position in this respect should not remain unchallenged and undiscussed. Parties to proceedings before this Commission, whether the Secretary of the Interior or anyone else, cannot be permitted to assert, unchallenged, a right to "veto" the Commission and the courts. If Congress has in fact given the Secretary such power, then it is only fair to the other parties litigant

10089

- 2 and to the Commission and the courts, to be spared the vain exercise of notice, hearing, and adjudication.

In his citation of statutory authority for his position, section 4(e) of the Federal Power Act is listed. This section gives the Secretary the prerogative of inserting conditions in licenses on property within his supervision in order to safeguard the purpose for which such reservation was created. This power relates to the initial issuance of licenses; the Secretary of Interior is granted no absolute power to overrule a Commission determination under section 10(e), which provides

"that when licenses are issued involving the use of government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, *in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands* . . . fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years . . ." (Emphasis added.)

(10090)

The tribes gave their approval to the Commission's readjustment subject to judicial review by filing a petition with this Commission in 1959, the petition now being decided.

The reference to "like approval" has as its antecedent, approval by the Indians. Seemingly, the Secretary's argument is that this becomes his approval inasmuch as he is trustee for the Indians. This is not helpful on the procedural question posed: if the Secretary has such overriding power is it proper for the parties, the Commission, and the reviewing courts to go through the motions of determining the charges?

The Secretary states (Brief on Exceptions, p. 12) that this "power stems from the Act of March 7, 1928 (45 Stat. 200, 212-213)." That Act was an appropriation bill allowing the Secretary to spend money for an irrigation and generation system on the Flathead Reservation and granting the Federal Power Commission the authority

#### 10090

- 3 "in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits on a license or licenses for the use, for the development of power, or power sites on the Flathead Reservation and of water rights reserved or appropriated for irrigation projects . . ."

Nowhere in this 1928 appropriations act is the Secretary given any greater power than to require conditions be inserted in any license or permit. This grants no veto over readjustments in charges. The other statutes upon which the Secretary relies (Footnote 4, Brief on Exceptions) do no more than grant him various powers over irrigation and

(10090)

power sites, as well as general responsibility for Indian relations. None grants any "veto".

A reference to the Secretary's "veto" power is contained in a footnote to the Court of Appeals of the District of Columbia's opinion on the Third Unit case, *Montana Power Company v. FPC*, 1962, 298 F.2d 335. Chief Judge Miller, in his statement of the background of the case, noted the Commission's adoption of an order fixing section 10(e) charges for the Third Unit of the Kerr Project at \$50,000, "subject to the approval of the Secretary of the Interior." The Secretary in that case did not approve, and reopened proceedings took account of his objections as to the method of computation of the charges, but without his participation or submission of evidence. On this point, the footnote reads:

"It was unnecessary and, perhaps, not even proper for him to do so. The Secretary was not a party to the proceeding. While he has a veto power, he is not required to aid the Commission in reaching its determination." *Montana Power Company v. Federal Power Commission*, CADC, 1962, 298 F.2d 335, 338. (Emphasis added.)

What the Court of Appeals presumably had in mind about the "veto power" was the explicit provision of the Commission order making its determination subject to the Secretary's approval. In the reopened proceedings, the Secretary's recommendations as to the appropriate level of 10(e) charges were adopted by the Commission.

The Commission has probably diminished the possibility of the Secretary exercising his supposed "veto" power, and

10091

- 4 thus furnishing a fair judicial test of his asserted prerogative, by adhering somewhat closely to the

(10091)

Secretary's contentions as to the method of computation and by fixing an award materially higher than that determined by the Examiner.

In the event the Court of Appeals should be asked to review the determination of appropriate rental to be paid to the Indian landowners—a distinct possibility in the light of the divergent views and fierce contest of this matter at every stage—it will have the opportunity to ponder whether the trust responsibilities of the Secretary of the Interior extend, as he has urged, both to nullify our determination and that of the Court of Appeals if he so chooses.

The reviewing court, if appeal is taken can also consider the relationship of the present case to the Third Unit case, cited above. When the District of Columbia Court of Appeals in 1962 affirmed the Commission's determination of section 10(e) charges for the Third Unit of Project No. 5, the redetermination case being decided today was three years old, having been commenced on May 19, 1959. The rationale of the Third Unit case was not the profitability rationale of today's decision; it was the net benefits rationale. The Third Unit's contribution to the whole of Project No. 5 is roughly half, in terms of generating capacity and energy generated. The Court of Appeals in 1962 determined annual charges of \$63,000 attributable to that half, beginning in 1954, and presumably continuing until redetermined in accordance with the statute. Today's redetermination is premised upon treating all three units together, thus making the effective date of redetermination for the Third Unit the same as that for the project as a whole, or May 1959. The effect of today's opinion is to wipe away that part of the 1961 Commission order, and its 1962 affirmance by the Court of Appeals, which covers the period from 1959 forward. If the prior

(10091)

Commission action, as affirmed by the Court, is to be rendered a partial nullity—in other words if the pro rata share of the Third Unit charges from 1959 to 1962, or from 1959 until the present, is to be raised from \$63,000 to eight times that amount, then a judicial prerogative question might be presented to the Court of Appeals, namely whether its earlier action was intended to be conditional to that extent. The present action, it must be remembered, was then pending.

#### 10092

5       An overriding consideration of fairplay is important in determining fair charges for hydroelectric projects licensed by the Commission. When a license is tendered, the applicant has the option of declining if he is not satisfied with the terms and conditions of the license. In the case before us today, one term of the license was that annual charges would be adjusted at the end of twenty years, and at ten-year intervals thereafter. In the best of all possible worlds, an applicant licensee should be able at that time to evaluate the economic impact of conditions attached to the license within reasonable limits. In other words, he must measure his best judgment about future operations and future economic conditions in the light of a tolerably stable regulatory pattern. Exposure to regulatory contingencies is an obligation of citizenship; applying regulatory contingencies fairly is an obligation of government.

The licensee and its stockholders and ratepayers are protected here mainly by the standard of reasonableness. As an abstract proposition it is fair and reasonable for a licensee to share his profits with landowners, whether Indian owners, other private owners, or the public at large. On a practical basis, however, a proposition so fundamental as the sharing of profits should be a part of

111: O Landowners always calculate rents on basis  
of profits. No lessor could make by using  
that rate as contracted with another site - net profits lost  
that also are basis of profits. But use of Indian fee  
value. (10093)

the "rules of the game," spelled out either in legislation or in regulations.

Still I do not dissent, for the end result of giving the Indians the benefit of the test adopted by the Commission today, seems to me reasonable under all the circumstances. I am, as stated, uncomfortable about reconciling the prior action on the Third Unit with today's action. Similarly, I believe the Secretary of the Interior's contentions regarding his overriding power to veto both our determination and that of the Court of Appeals if he feels so moved should be faced squarely. Finally, the absence of a clear rule specifying that a profitability test might be applied retrospectively raises questions which may concern the Court which affirmed a different test.

/s/ JOHN A. CAEVER, JR.  
John A. Carver, Jr.,  
Commissioner

10093

UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Project No. 5

THE MONTANA POWER COMPANY

Readjustment of Indian Annual Charges Pursuant to  
Article 30(d) of the License and Section 10(e) of the  
Federal Power Act.

#### Application for Rehearing

Come now the Confederated Salish and Kootenai Tribes of the Flathead Reservation and pursuant to Section 313 of the Federal Power Act and Rule 1.34 of the Commission's Rules of Practice and Procedure petition the Federal Power Commission for a rehearing on its opinion



(10093)

and order readjusting annual charges issued in the above-entitled matter on October 4, 1967 (Opinion No. 529), upon the ground and for the reason as follows:

SPECIFICATION OF ERROR

The Commission is in error in its determination of a readjustment of annual charges to the extent that it overlooked as an increment of commercial value the net value received by the Montana Power Company for the head-water benefits the Kerr Project confers

10094

on downstream projects.

REASON

Section 10(e), as amended, of the Federal Power Act and Article 30(d) of the license direct that the reasonable readjusted annual charge be based upon the commercial value of the tribal lands involved for the most profitable purpose for which suitable, including power development. The Commission correctly followed this criterion and held:

“After considering the various methods for computing the value of the project we adopt Van Scoyoc’s method as the one which most conforms to the statutory intent. This is the only method which ascertains the value of the Kerr project for the most profitable purpose for which the Tribal lands are used, which all parties agree is for power production. We agree with the Examiner’s observation that: ‘Mr. Van Scoyoc’s analysis provides a realistic and impressive demonstration of the profitability of Project No. 5 . . .’ While the Examiner was concerned with the complexity and the uncertain allocations involved, *no party* has excepted to the manner in which this analysis was performed, and we believe from our independent scrutiny that the method was implemented in a reasonable manner.

Moreover, while this method involves judgment factors, it has the advantage over the net benefits approach in that it is directly concerned with the actual operation of the project being considered and does not depend on such speculative aspects of the net benefits theory, as, for example, what alternative project the company would have constructed, a subject on which there is considerable debate, whether to use trended costs, or the appropriate level of coal costs for an alternative steam plant" (P. 21).

### 10095

However, in setting the readjusted annual charge based on Mr. Van Scoyoc's calculations, the Commission failed to include a distinct element of value attributable to the tribal lands and waters. Flathead Lake storage amounts to 1,217,000 acre feet, and because of this storage Montana Power Company receives, pursuant to Section 10(f) of the Act, value in kind (kilowatt hours) and in cash from downstream projects benefitting from Flathead Lake storage releases. Thus, Flathead Lake storage is of commercial value to the Company. Therefore, what it contributes by net headwater benefits should have been considered as an increment of value for purposes of readjusting the annual charge and Mr. Van Scoyoc testified not only that he believe commercial value included headwater benefits, but that he would have included such net benefits in his calculations if he had had the requisite figures (Tr. 480, 515).

The requisite figures were available at the trial, although not when Mr. Van Scoyoc made his calculations. The following, taken from Exhibit S-7, amended, prepared by Mr. Mohler of the Department of the Interior, shows the storage payments for 1959-1969 from the Kerr Project for upstream releases from Hungry Horse Dam and payments to Kerr for downstream project resulting from releases from Flathead Lake.

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Headwater Benefits—Payments and Receipts, 1959-1969

Payments to Kerr Project (Nonfederal)	\$1,305,400.00
Imputed Amount to Kerr Project for Thompson Falls Project	68,800.00
Power Furnished in Lieu Payments (Federal)	1,166,700.00
Total Value of Kerr Project	<u>\$2,540,900.00</u>
Storage Received by Company	
Less Payments to United States for Hungry Horse Storage for Kerr Project	<u>1,541,170.00</u>
Net Value of Kerr Project	\$ 999,730.00
Headwater Benefits received by Company	
Average Annual Amount	99,973.00
One-Half Assigned to Tribes	49,987.00
(Rounded)	50,000.00

The net average annual benefit is \$99,973.

Because one-half of the lake is tribally-owned, equity and fairness demand a division of the net benefits 50% to the Tribes and 50% to the Company. This can be rounded to \$50,000 a year. However, because the Commission has concluded that the tribal share of the commercial value should be 42.13%, as determined by Mr. Sporseen, the Tribes should in no event receive less than that percentage, or \$42,119, which may be rounded to \$42,000.

10097

Therefore, the Commission should modify its opinion and order by increasing the adjudged readjusted annual charge by an additional sum of \$50,000—but in no event less than \$42,000.

CONFEDERATED SALISH AND KOOTENAI  
TRIBES OF THE FLATHEAD RESERVA-  
TION, MONTANA

By: JOHN W. CRAGUN  
John W. Cragun

(10099)

10099

Secretary of the Interior Letter of November 3, 1967 Signifying  
Acceptance of Opinion 529, etc., Received November 6, 1967.

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SECRETARY  
WASHINGTON, D. C. 20240

November 3, 1967

Dear Mr. White:

On October 4, 1967, the Commission rendered Opinion and Order No. 529, readjusting the annual charges paid by the Montana Power Company to the Flathead Tribes for the Kerr Hydroelectric Development (Project No. 5). In the October 4 order the annual charges were increased from \$238,375 to \$950,000, with the increase retroactive to May 20, 1959. The Tribes were awarded simple interest at the rate of six percent for the charges retroactively payable.

By this letter we signify our acceptance of the October 4 order. Although in our intervention in behalf of the Tribes we contended that a different method for the computation of annual charges should be used and that a substantially larger annual payment should be awarded, the award made by the Commission is not, in our view, unreasonable. There is a margin for the exercise of judgment both as to the method of computation and the amount to be awarded, and we do not believe that the October 4 order oversteps the margin of fairness and reasonableness.

This letter should not be read, however, as reflecting unfavorably on the Tribes' application for rehearing. The Commission could reasonably increase the award to include recognition of the value of the headwater benefits that the Company receives from the Kerr project. On the other hand, we would not, in the discharge of our trust and other

(10099)

statutory responsibilities to the Tribes, interpose any objection to the October 4 order if it is retained in its present form.

There appears to be a typographical error on page 2. Item 3 in the middle of the page states that "the readjusted annual charges should be effective 20 years from May 20, 1959;" whereas the readjusted charges are clearly intended to take effect 20 years from May 20, 1939.

Copies of this letter have been sent to counsel of record, and we request that it be made part of the official record of this proceeding.

Sincerely yours,

STEWART L. UDALL  
*Secretary of the Interior*

Hon. Lee C. White  
Chairman  
Federal Power Commission  
441 G Street N.W.  
Washington, D. C. 20426

• • • • •

10103

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL POWER COMMISSION

THE MONTANA POWER COMPANY

PROJECT No. 5,  
Readjustment of Annual Charges

**Application for Rehearing on Order of October 4, 1967**

Pursuant to § 1.34 of the Rules of Practice and Procedure, comes now The Montana Power Company, licensee, and requests rehearing on Opinion No. 529 and the accom-

(10104)

panying order issued October 4, 1967 readjusting the annual charges due under the license for Project No. 5, the Kerr Hydroelectric Development, for the use of Indian tribal lands upon the following grounds:

A. JURISDICTION OF THE FPC

(1) The Commission is in error in holding, p. 7, that the readjustment of annual charges by an arbitration board as provided in Article 30 (D) of the license was set aside by Congress when § 10(e) of the Power Act was amended in 1935.

(2) The Commission is in error, p. 6, in deciding that the protection of existing licenses accorded by § 28 of

10104

the Federal Power Act extends only to "substantive" rights.

Section 28 is not framed in any such niggardly fashion. Rather, it is a firm declaration by Congress that "no . . . amendment . . . shall *affect* any license theretofore issued"—a clear statement that existing licenses remain just as they were before. Section 28 also states that no amendment shall effect "the rights of any licensee thereunder" [under any license previously issued]. This is *not* a statement that only substantive rights are given this protection; the word "rights" is unqualified. "Rights" are protected, whether they be dubbed "procedural" or "substantive."

(3) The Commission is in error, p. 5, in disregarding the fact that Article 30 (D) was expressly included in License Amendment No. 2 issued after the Act was amended in August, 1935.

Whether the readjustment of annual charges by arbitration is a procedural matter which might have been changed by Congress in the 1935 amendment of § 10(e), as held by the Commission, is immaterial, since after the 1935 amend-

(10104)

ment the provision for arbitration in Article 30 (D) was expressly continued by the parties.

**10105**

When License Amendment No. 2 was granted by the Commission on June 23, 1936, accepted by the licensee, approved by the Confederated Salish and Kootenai Tribes and the Secretary of the Interior and formally issued July 17, 1936<sup>1</sup>, the arbitration clause in Article 30 (D) was expressly restated as a license condition. Amendment No. 2 was subsequent to the statutory amendment of § 10(e) in 1935 and was within the authority of the Commission in 1936. Amendment No. 2 was validly issued and should govern any readjustment of the annual charges.

The issuance of Amendment No. 2 in 1936, however, was not the last official recognition by the Commission of the validity of Article 30. When the third unit was authorized on September 18, 1959, 22 FPC 502, 523, the Commission adopted the initial order of the Examiner which added paragraph 4 to

**10106**

Article 30 (A) of the license and also provided that—

(C) This amendment in the manner set out above will not operate to alter or amend the license for project No. 5 in any other respect and shall not in any way constitute a waiver of any other part, provision or condition of the license as heretofore amended.

Practically the same language was used by the Commission in its order of January 30, 1961, 25 FPC 221, 224, when it

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<sup>1</sup> Amendment No. 2 rescheduled the past due annual charges and provided for payments through 1954, adding: "Thereafter, until adjustment of the annual charges payable hereunder shall have been effected pursuant to the provisions of paragraph (D) of this Article 30 . . . \$175,000." The Commission, the Secretary and the Tribes do not question this wording.

(10107)

upped the third unit charge from \$50,000 to \$63,375 upon the insistence of the Secretary of the Interior.

Inasmuch as the Commission was in these two recent orders dealing expressly with Article 30 of the license, these orders cannot be said to be a modification or repudiation of Article 30 (D). Opinion No. 529 is not a repudiation of Article 30 (D) but a unilateral modification, for the Commission resorts to that paragraph to justify basing the rental charge "on the commercial value of the lands for the most profitable purpose" which is the language of Article 30 (D) and not § 10(e) of the Act. It merely repudiates arbitration.

(4) The Commission is in error, p. 7, in citing as

10107

authority for regarding the arbitration clause as procedural the Third Circuit's decision in *Pennsylvania Power & Light Company v. F.P.C.*, 139 F.2d 445, (1943), certiorari denied, 321 U.S. 798; on p. 8 a Commission decision in *Safe Harbor Water Power Corporation*, 5 FPC 221, 243, aff. 179 F.2d 179 (1949), certiorari denied, 339 U.S. 957; and, on p. 9, *Oshkosh Waterworks Company v. Oshkosh*, 187 U.S. 437.

The *Pennsylvania Power & Light* case concerned the Commission's authority under the Power Act to control the licensee's capital accounts as contrasted with the project construction accounts. The licensee asserted that notwithstanding the 1935 amendment to § 14 of the Act, transferring from district courts to the Commission the right to determine the project cost or net investment, the Commission could not require it to transfer certain items to its surplus account. The Third Circuit, p. 453, considered FPC control of project accounts to be previously established.

We see no merit in these contentions. Four federal courts of appeals have sustained the authority of the



(10107)

Commission to require items of project costs which it has disallowed to be written off to surplus under circumstances similar to those here disclosed.

10108

This is solely affirmation of the Commission's authority to control project accounts. It is not a holding by the Third Circuit that when the net investment is finally to be determined the determination could be made by the Commission as provided in 1935 instead of by a district court as provided in 1920. The latter issue was not before the Third Circuit and was not found by that court to be an issue before it. The Supreme Court gave no reasons for denying certiorari.

In the *Safe Harbor* case the argument was that § 28 of the Power Act protected a licensee's right under § 14 to the determination of its project net investment in a rate case under § 20. As to this, the Third Circuit said, 179 F.2d at 187:

Section 28 does not require a different conclusion [as to the meaning of value under § 14 when applied in a rate proceeding under § 20]. That section [14] does not confer upon the licensee a right to an excessive rate of return or sustain a charge that the Commission in the instant case is in effect changing the rules relating to ascertainment of rate base in the middle of the stream. The present pertinent provisions of § 20 have remained unchanged since 1920.

In other words, the Third Circuit did not say that a statutory change affecting a licensee's right to a district court determination of net investment under a license issued

## 10109

prior to 1935 was made in 1935 without violating § 28 of the Act. The court was not required to rule upon the point. The Supreme Court gave no reasons for denying certiorari.

There is nothing in the legislative history of the 1935 amendment to suggest that Congress amended § 10(e) because of ad hoc arbitration determination of Indian land rentals would lack the "established expertise" of a Commission determination. Moreover, no such distinction was advanced to persuade the parties and the Commission in 1936 that Amendment No. 2 should be modified to remove the arbitration clause. But if this is the reason for the statutory change, it was not mentioned in 1936 when the parties could have evaluated its merits.

What the Commission now proposes is a unilateral change in a plain license provision (whether by Congress in 1935 or by the Commission in 1967 is immaterial), without any intimation that there is any ambiguity in the language of Article 30 (D) or in Amendment No. 2, and without any intimation that the parties and the Commission did not know what they were doing in agreeing to the license in 1930 and to Amendment No. 2 in 1936 after § 10(e) had been amended in 1935.

(5) On p. 6 the Commission concedes that: "If Section

## 10110

30 (D) of the license confers a substantive right on the licensee that right is expressly reserved by Section 28 of the Federal Power Act." It is in error in not finding the right to arbitration to be substantive when it has been judicially so held. The most direct statement appears in the Second Circuit's decision by Judge Medina in *Robert Lawrence*

(10110)

*Co. v. Devonshire Fabrics*, 271 F.2d 402, 409, CA 2 1959, certiorari dismissed under Rule 60, 364 U.S. 801:

We, therefore, hold that the Arbitration Act in making agreements to arbitrate "valid, irrevocable, and enforceable," created national substantive law clearly constitutional under the maritime and commerce powers of the Congress, and that the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists. We hold that the body of law thus created is substantive, not procedural, in character, and that it encompasses questions of interpretation and construction, as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs, since these two types of legal questions are inextricably intertwined.

In passing upon the enforceability of an arbitration clause, judicial inquiry has first been directed to the applicability of the United States Arbitration Act, first passed in 1925, 43 Stat. 883, *Wilko v. Swan*, 346 U.S. 427, 435-438 (1953).

#### 10111

Once this is established, the right to arbitration is held to be substantive.

Moreover, Opinion No. 529 ignores judicial determinations in *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 203 (1956), that the remedy of arbitration—

whatever its merits or shortcomings, substantially affects the cause of action created by the State. The

(10112)

nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.

In refusing to similarly so hold here, the Commission is in error.

(6) The Commission is in error, page 7, in deciding that no "substantive" rights are destroyed by applying § 10(e), as amended by the Act of August 26, 1935, to this proceeding. In addition to the change in the method of determining the annual charge, the amendment modifies existing rights by creating the need for the approval of the readjusted charge by both the Secretary of the Interior and of the Indian tribes having jurisdiction of the land.

Section 10(e), as originally enacted, and as embraced in the license issued to Montana Power Company in 1930, provided only that the annual charges may be readjusted "in a

#### 10112

manner to be described in such license." The license described the manner to be followed in adjustment. As now modified in Opinion No. 529 and now sought to be applied, the annual charges are not only to be readjusted "by the Commission," but under § 10(e) of the Act the redetermination is to be "subject to the approval of the Indian tribe having jurisdiction of such lands." To assert that the addition of this "veto" is not a substantive change is to rob the word "substantive" of all meaning.

The comparison, of course, must be between the original manner of readjustment, as "described in each license," and that described in § 10(e) as amended—by the Commission, and subject to the Indian veto. They are *substantially* different.

First, determination is to be made by the Commission, rather than by arbitration. As already noted elsewhere in

(10112)

this petition for rehearing, we believe this alone suffices to make the change one of substance—if “substantive” change be a relevant consideration, which we deny.

Second, the redetermination is for the first time made subject to the “veto” of the Indian Tribes. Article 30 (D) of the license contemplates that “In case the

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Licensee, the Commission, and the Secretary of the Interior cannot agree,” the arbitration will be held to settle the matter, and will be as binding on the Indian Tribes—and on the Secretary of the Interior—as it is on the Commission and on the licensee. There is no suggestion that the Secretary has the power to repudiate the arbitration award, nor is there any sound basis for holding that, as trustee for the Indians, he was not warranted or authorized to enter into such a license agreement when he signed it in 1930, and reaffirmed it in 1936.

We submit, therefore, that not only is the denial of the right to arbitration a “substantive” change—if that be the relevant standard—but that the *totality* of the changes the Commission has imposed from the provisions of Article 30 (D) are clearly and undeniably “substantive,” and hence cannot have been permitted either by § 28, or, indeed, by the due process clause of the Constitution.

(7) The Commission is in error, p. 9, in regarding

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arbitration as so procedural that it may be classified with other remedial changes heretofore approved by the courts. The *Oshkosh Waterworks* decision, *supra*, cited by the Commission, p. 9, is one of a long line of decisions starting in 1819, *Sturges v. Crowninshield*, 4 Wheat. 122, upholding the right of a State legislature to make post-contract modi-

fications in remedies for contract review or even in the rights of the parties thereunder. In none of these decisions does the Supreme Court uphold the legality of substituting for arbitration either agency or judicial determination of contract rights established prior to the legislative substitution or hold arbitration to be procedural.<sup>2</sup>

In these cases the procedural character of the modification of a prior remedy has first been found and then it has been held that substantive rights were protected. In none of these has there been a judicial holding that arbitration

#### 10115

under the United States Arbitration Act is solely procedural.

The dependence of licensing jurisdiction upon the *Commerce Clause* was settled in *Union Electric Co. v. F.P.C.*, 326 F.2d 535, CA 8 1964; reversed on other grounds, 381 U.S. 90. See also *Nantahala Power & Light Co. v. F.P.C.*, CA 4 1967, slip op. 18-19.

(8) The Commission is in error in not recognizing the consequences of the position taken by the Secretary of the Interior as described in the concurring opinion of Commissioner Carver—namely, the Secretary's claim that he has the ultimate authority to accept or reject the final determination of the adjusted annual charge. As Commissioner Carver states, the Secretary, since the beginning of this proceeding, has asserted, and still asserts, that "After . . .

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<sup>2</sup> The doctrine was explained in *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 58 (1935) and *El Paso v. Simmons*, 379 U.S. 497, 380 U.S. 928 (1965). The dissent by Mr. Justice Black in the *El Paso* case, 379 U.S. 517-535, dissects the considerations behind this line of cases and the reasoning of the Court that procedural changes may effect outstanding contracts but not substantive. See *Hanna v. Plumer*, 300 U.S. 460 (1965) and *ABA Journal*, March 1967, p. 266.

(10115)

the proceeding has reached its conclusion, including the exhaustion of appellate procedures, the Secretary then has a responsibility to determine whether the Commission's findings should be accepted or rejected."

Such a position, unless it is effectively dealt with by the Commission, may be used to attempt to negate the possibility of judicial review of Opinion No. 529. That a determination which is not a final decision of a matter is not a "case or controversy" over which the courts have jurisdiction has

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been settled since the earliest days. In *Hayburn's Case*, 2 Dall. 409 (1792), the Supreme Court declined jurisdiction of a case in which its judgment in a pension case might be revised or rejected by the Secretary of War. Again, in *United States v. Ferreira*, 13 How. 40 (1852), the Court declined jurisdiction in a case involving claims arising from the treaty between the United States and Spain, because the Secretary of the Treasury was authorized to make payment only if he thought the judgment was just and equitable. See also *Muskra v. United States*, 209 U.S. 346 (1911); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 216 (1937). In the earlier Third Unit proceeding (*Montana Power Co. v. Federal Power Commission*, 298 F.2d 335, CADC 1962), the issue now posed was not raised, since the Secretary had approved the Commission's decision before any judicial review was sought, and did not assert any power to take any further action later.

This result can be avoided, and should be avoided, in this proceeding by giving effect to arbitration procedures specified in Article 30 (D) of the license, and thus avoiding any secretarial veto.

Furthermore, under § 313(b) of the Federal Power Act

## 10117

only final orders of the Commission may be reviewed by a court of appeals. If, as the Secretary of the Interior claims, he has a right to veto any readjustment made by the Commission in this proceeding, the Commission's order (Opinion No. 529 and the order on rehearing) will not be final until approved by the Secretary, and he might claim that his approval was the final order.

Article 41 of the license, which is derived from the 1928 Act (45 Stat. 200, 212-213), does not require a different conclusion. Article 30 (D), providing for arbitration, would be deprived of all meaning if the Secretary of the Interior were able to subvert the arbitration award. The award would be deprived of the conclusive effect it is clearly designed to have if the Secretary were able simply to refuse to accept it. Reading the license as a whole, the intention is apparent that the arbitration provision of Article 30 (D) is to be the final and binding mechanism for determining readjustment, and is to settle not only the obligations of the licensee, but also the rights of all other interested parties.

Article 41 of the license does not distinguish between changes which are procedural and those which are substantive but relates to any change in the terms of the license. If under the terms of Article 30 (D) as modified by the Commission

## 10118

in Opinion No. 529, the Secretary does not have a veto of the Commission's readjustment, the Commission should say so. The licensee does not ask for any modification of the terms of Article 30 (D) as issued in 1930 and amended in 1936 and, of course, under that Article the Secretary of the Interior has no veto power to set aside an arbitration award.



(10118)

B. THE COMMISSION IS IN ERROR IN MAKING  
THE PAYMENTS RETROACTIVE

(9) The Commission is in error, pp. 11-12, in deciding that the readjusted charges should be made retroactive to May 20, 1959.

Article 30(a)(3) of the license, as amended in 1936, is not subject to unilateral modification by the Commission, and is specific as to the time when a readjustment will become effective. That Article states:

“Thereafter, until adjustment of the annual charges *shall have been effected* pursuant to the provisions of paragraph D of this Article 30 . . . \$175,000.” (Italics added)

Contrary to the opinion of the Commission, there is in this no inequity—indeed, the inequity lies in the retroactivity ordered by the Commission. The licensee was not responsible for the delay which has occurred. It sought

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at the very outset of the proceedings to have the arbitration specified in Article 30 (D) of the license, and, had its request been accepted and the license agreement followed, the readjusted rate would have long since been determined. Moreover, it was not responsible for the delay in the proceeding caused by the pendency and determination of the third unit proceeding.

Retroactivity does, however, result in major inequity to the licensee, to which the Commission also owes the duty of fairness. The Commission must realize, for example, that it was not possible for the licensee to make “adequate provision for possible increased payments by maintaining a reserve account” (p. 12). The amount of possible increased expense was not known to the licensee until the testimony

(10121)

was filed by the various parties in October 1965. There was no justification for setting up a reserve prior to that date, and even thereafter neither the Montana Commission nor this Commission would have allowed such a contingent reserve in a rate proceeding. Moreover, the licensee would not have known for what increased rentals it should have established a reserve, for there are seven figures shown on p. 18 of Opinion 529 as possible rental charges.

10120

This Commission has allowed consideration of contingencies where the outcome was certain, or could be readily calculated. *City of Cleveland v. Hope Natural Gas Co.*, 3 F.P.C. 150, 184 (1958); *South Carolina Generating Co.*, 19 F.P.C. 855, 862 (1958); *United Gas Pipeline Co.*, 32 F.P.C. 1515, 1519 (1964). It has refused to include, however, contingent expenses where the outcome was uncertain or could not be ascertained, and has said that it will not take into account uncertain changes or changes "that are too remote in time which might destroy the representative character of the test year." *Sinclair Oil & Gas Co.*, 30 F.P.C. 1314, 1315 (1963); *Midwest Gas Transmission Co.*, 32 F.P.C. 993, 996-997 (1964).

Under all the circumstances, not only is the retroactivity ordered by the Commission contrary to the license, but it is unreasonable, and inequitable to the licensee.

10121

C. INTEREST CANNOT BE CHARGED AGAINST THE MONTANA  
POWER COMPANY ON RETROACTIVE PAYMENTS UNTIL  
SUCH PAYMENTS BECOME A LIQUIDATED SUM

(10) The Commission is in error, pp. 12-13, in requiring the payment of interest on the increase in rentals. The Common law rule and general rule in most jurisdictions is that an unliquidated claim bars the allowance of interest

(10121)

on that claim because the person who was liable did not know what amount he owed and therefore should not be charged with interest for not paying an unknown sum. That common law has been codified into the Revised Codes of Montana. (See Section 17-204 Revised Codes of Montana, 1947, as amended)

A long line of Montana cases affirms the principle that a claim must be liquidated before interest can be charged. (*Palmer v. Murray*, 8 Mont. 312, 21 Pac. 126, 127; *Daly v. Swift & Co.*, 90 Mont. 52, 300 Pac. 265; *Eskestrand v. Wunder*, 94 Mont. 57, 66, 20 Pac. 2d 622 (1933); *School District No. 1 v. Globe Republic Insurance Co.*, 146 Mont. 208, 404 Pac. 2d 889; *U.S. for the use and benefit of Chemetron Corp. v. Geo. A. Fuller Co.*, 250 Fed. Supp. 649; *W. J. Lake & Co. v. Montana Horse Products Co.*, 109 Mont. 434, 441, 97 Pac. 2d 590).

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In the case of *American Surety Co. v. Cove Irrigation District*, 54 F. 2d 197, at 199, CA 9 1931, the 9th Circuit Court stated:

. . . interest should only be recoverable when the amount which will discharge defendant's liability is ascertained or is ascertainable, so that payment or tender could have been made at the time it should have been made.

The theory that no interest is chargeable on unliquidated rentals has also been followed by the courts. In *Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. 354, 21 LRA 726, the principle is stated as follows:

If the amount of the rent owing is unliquidated, interest is not recoverable until the amount which the tenant ought to pay is fixed and made certain; thus, where the lease of the water power provides for a cer-

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tain rent payable quarterly but also provides that in default of a sufficient supply of water from any cause a pro rata portion of the accruing water rents shall be forfeited, this will render the amount of rent due under the contract dependent upon the supply of water for each quarter, and hence the amount of rent, in case of an insufficient supply, is unliquidated; and if the contract makes no provision for the payment of interest, it cannot be recovered until the amount of rent which the defendant ought to pay is fixed and made certain.

If a sum is due retroactively in this case, such sum did not become liquidated prior to the date of Opinion 529 and

### 10123

the licensee hereunder cannot be charged interest on unliquidated claims prior to the issuance of that decision, October 4, 1967.

(11) If interest is due on retroactive payments, the Commission is in error, pp. 12-13, in changing the Examiner's finding that 4 percent simple interest is the proper rate of interest to 6 percent.

If any interest can be said to be due, such interest rate should be based upon what the out of pocket situation would be had the Indians been paid at the time. That sum is 4 percent per annum and is established by Congressional action. Public Law 100 of the 70th Congress (45 Stat. 200, 212-213 approved March 7, 1928,) states:

Provided further, that the Federal Power Commission is authorized in accordance with the Federal Water Power Act . . . to issue . . . licenses for the use, for the development of power, of power sites on the Flathead Reservation . . . Provided further, that

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rentals from such licenses for use of Indian lands shall be paid the Indians of said reservation as a tribe *which money shall be deposited in the Treasury of the United States to the credit of said Indians, and shall draw interest at the rate 4 per centum.*

It is therefore evident that had payments been made when allegedly due under this decision, the Indians would have received only 4% interest on such payments. The extra 2% awarded by the

**10124**

Commission would be a windfall to the Indians.

Further, the prime interest rates for the period 1959-67 show that a 6% rate of interest for this period is completely unreasonable and unjustified, if the argument is that The Montana Power Company was using someone else's money.

Montana Power could have borrowed money at the prime interest rates by years shown in the following table:

DATE	PRIME INTEREST RATE
May 20 to Sept. 1, 1959	4½%
Sept. 1, 1959 to Aug. 23, 1960	5%
Aug. 23, 1960 to Dec. 6, 1965	4½%
Dec. 6, 1965 to Mar. 10, 1966	5%
Mar. 10, 1966 to June 29, 1966	5½%
June 29, 1966 to Aug. 16, 1966	5¾%
Aug. 16, 1966 to Jan. 26, 1967	6%
Jan. 26, 1967 to Oct. 4, 1967	5½%

(December 1960 Federal Reserve Bulletin, page 1367, and September 1967 Federal Reserve Bulletin, page 1608)

The average prime interest rate for the period May 1959 to October 1967 based on a daily rate was 4.79%. Therefore, no justification can be shown for applying the 6% rate in this case.

## 10125

## D. THE THIRD UNIT ISSUE WAS ERRONEOUSLY DECIDED

(12) The Commission is in error, pp. 13-15, in holding that it was authorized to readjust the Indian land rental for the third unit in this proceeding.

The Commission points out that the licensee, in the third unit case (*Montana Power Co. v. Federal Power Commission*, 298 F.2d 335, CADC 1962) urged that the license for Project No. 5 was for the entire project, requiring only an amendment to add the third unit authorization. Had the licensee prevailed in that case, there would have been no additional rental due for the third unit, and there would be no basis for objecting to the present conclusion of the Commission that the 20-year period was the same for all three units.

However, the licensee did not win. The court of appeals, in dealing expressly with this issue, held that the additional authority sought by the licensee for the third unit "was a new and original license" and added that it "was subject to the requirements of § 10(e) with respect to the use of the tribal lands" (298 F.2d at p. 339). This is now *res judicata*, and not now open to review and reversal by the Commission.

There can be no doubt that all of § 10(e) applies to this "new and original license"—including the provision that

## 10126

the charges fixed for it (and approved by the court) are not open to adjustment until 20 years from the date the third unit was "available for service." The decision by the Commission to the contrary is directly contrary to the decision of the court of appeals. To consider Project No. 5 as one "project" and to decree—as the Commission does—

(10126)

that the "project" has operated for 20 years and hence is open in all of its aspects to readjustment of the Indian land rentals is to rely on the same argument that was expressly rejected by the court of appeals in 1962.

The Commission cannot find support for its position, as it purports to do at page 15, by arguing that the position of the licensee would also require a different 20-year date for the first unit than for the second unit, because the latter was placed in service ten years later than the former. The first and second units were both authorized in one license, as one "project works," and hence share a common 20-year period. No new application was made for the second unit. The third unit, on the contrary, was the subject of a new application, which resulted in a "new and original license."

There is no practical difficulty in this conclusion. The third unit has been separately evaluated once, and there is no reason to believe either that it cannot be again, in 1974, if

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appropriate, or that the first and second units cannot be evaluated separately, as the court has determined that they were when the license for them was originally issued.

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E. THE PROFITABILITY METHOD USED FOR READJUSTING  
THE LAND RENTAL CHARGES IS NOT REASONABLE HERE

(13) The Commission is in error when on p. 21 it says that the profitability method for computing the value of the project is "the one which most conforms to the statutory intent" for it "is the only method which ascertains the value of the Kerr project for the most profitable purpose for which the Tribal lands are used." It is also in error, p. 16, in deciding that the entire analysis must be made *de novo*.

In the first place, instead of meeting the statutory standard of reasonableness (with which the licensee has no quarrel), the Commission, pp. 21 and 22, turns to the license and says that the parties by the terms of Article 30 (D) spoke in terms of fixing the rental charges upon the basis of § 5 of Regulation 14, the most profitable purpose for which suitable. The statute merely says that the rental charge shall be reasonable.

When the Commission, p. 16, relates this readjustment to the practice in rate cases, it is making an inappropriate comparison. The rental charge to be paid for the use of Indian lands under § 10(e) of the Act is not similar to a rate charged by the licensee for electric service. The latter

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may be adjusted by an authorized regulatory agency at any time it is found to be unjust or unreasonable. Readjustment of the Indian land rental charge is permitted by the statute only at specified intervals. Even if it should turn out to be too low for the Indians or too high for the licensee during the first twenty years, no readjustment may be made until twenty years have elapsed.

Also, a rate for the sale of power has none of the protection for the licensee which would be afforded by a contract, except for those few rate contracts which the Commission permits to be filed as rate schedules; e.g., *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Section 28 of the Act gives to the Project No. 5 license many of the characteristics of a contract, binding alike upon Congress, the Commission and the licensee.

Moreover, it is impossible to make this readjustment analysis *de novo* by placing all of the parties on an equal footing when the licensee has no choice as to whether or not it will enter into the balance of the license term with the



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readjusted rental. This would be a *de novo* analysis for everybody but the licensee. Having constructed the Kerr project during the first twenty years at a total cost of

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more than \$15,000,000, the licensee has no choice but to comply with the terms of the statute and the license. The Examiner did not reach the conclusion that profitability should be the test; consequently the licensee was under no obligation to except to that theory as a matter of law. *Sunray DX Oil Co. v. F.P.C.*, 351 F.2d 395, 400, CA 10 1965.

Before the profitability theory is accepted, the Commission should find the present rental to be unreasonable or not in conformity with Article 30 (D). The Commission does not now find that in fixing the rental for the third unit in 1959 and in 1961 the rental originally fixed for the first two units was unreasonable in 1930, in 1936, in 1959, or in 1961 nor does it find the rental for all three units as of May 20, 1959 was then unreasonable or is now unreasonable. The D.C. Circuit expressly found that the licensee had failed to show that the third unit charge was unreasonable. *Montana Power Co. v. F.P.C.*, 298 F.2d at 339. Is the Commission now saying that it was unreasonable in some prior year?

On p. 16 the Commission says that "a prescribed charge will continue under § 10(e) until demonstrated to be inappropriate" and it draws no conclusion that the prior charges were or

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are inappropriate. The statute and the license do not say that the charges shall be "appropriate" but that they shall be "reasonable". Whatever may be added on rehearing, at least Opinion No. 529 does not say that readjustment is predicated here upon the unreasonableness of the present

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charges. At most, it would only appear that the present members of the Commission would set a higher rental, not that any prior Commission failed in its duty to the Indians.

Although it says, p. 16, that the present readjustment may not be disturbed in 1969 when it could be changed again, there is nothing in Opinion No. 529 to prevent readjustment in 1969 if three of the then members of the Commission should be of the opinion that the rental was then unreasonable and should be readjusted. If Article 30 may be disregarded now, it may be disregarded in 1969. If the rules for the determination of the rental may be changed now, they may be changed in 1969.

The annual charges fixed in the license in 1930 and re-scheduled in 1936 at a fixed rate are not dependent on the power output of the Kerr project. They are guaranteed to the Indian Tribes whether the Kerr plant is used to its maximum capacity or not, regardless of the plant output or the profits

#### 10132

of the licensee.

It is not correct to say, p. 22, that "a form of profit sharing was indeed contemplated . . ." or that the profitability method "does not mean that the Tribes are completely dependent upon how Montana Power operates the project."

An Indian land rental based upon profitability had been proposed in 1930, argued at length and rejected. The Scattergood Report, Item H by reference, pp. 51-52, explains why it was rejected:

The advantage in this plan [profitability] is that in the higher brackets of power production, the Indians would be able to secure considerably greater rentals. The disadvantage is that in the lower brackets where the profit is insufficient even for a fair return to the

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company, the Indians must either run the risk of little or no rental or they must be given a fair minimum rental. Even this minimum will then show a heavier loss to the company than it proved willing to agree to. Furthermore a number of difficulties were encountered in all these profit-sharing plans in providing against any possibility of the use of the Flathead plant for peaking purposes only or in dull times the giving to it of only a reduced proportion of the entire system load, and in general the avoiding of the temptation to starve this plant in order to reduce the Indian rental. Four months of negotiations were consumed in discussing those various plans and the variables upon which they were based and we were never able to reach an agreement. Several deadlocks actually developed with the breaking off of negotiations.

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Finally efforts on these lines were abandoned and a new approach was entered upon with the plan of a flat rental.

(3) Flat rental.—The third plan of a flat rental basis was finally agreed to on terms as set forth below. This plan of rental has the advantages of (1) reducing all risks to the Indians and providing an assured, definite and uniform rental regardless of the amount of use of the plant by the licensee; (2) it avoids the difficulties of assuring to the Flathead plant its fair proportion of system load; (3) it avoids any inducement that Flathead be used for peaking purposes, or that it be starved unduly at high water periods when other plants of the system could carry an increased share of the load; (4) it avoids all problems arising from any form of partnership of the Indians with the licensee; and (5) it eliminates subjecting the Indians to the ups and downs of business and to industrial depressions, a

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feature which especially exists in Montana, where the electric demand is so largely industrial in character.

Secretary Ickes, in a letter to the Commission in 1934, Item K by reference, gave similar reasons why a flat rental, not dependent upon profitability, was the only one acceptable to the Indians. A flat rental, he said, meant that the Flathead Tribe would secure

no additional benefits from any business successes of the licensee. It should not be expected now to assume the burdens of the licensee's financial distress. The licensee

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assumed the risks of profit and loss. Among those risks was the eventuality that changed economic conditions would render the construction and operations of the power site unprofitable. If such is now the case, the licensee may still be expected to meet its contractual obligations toward the Government as it would be expected to meet the contractual obligations toward other individuals which turn out to be unprofitable. The loss to the licensee is not a loss to the Flathead Indians.

Although the Commission imposes a flat rental, it gears the dollar amount to what it claims are the profits of the licensee during a fixed period. Assuming, *arguendo*, the validity of the conclusion that excess profits were earned (a conclusion not well founded, as we show hereinafter), this flat rental gives to the Indians all the advantages of successful operation and none of the risks assumed by the licensee—the precise features making profitability unpalatable in 1930 and 1936.

Having had the benefit of the flat rental since 1936, the Indians should not be allowed to change the basis in mid-

(10134)

stream. The licensee has now made an investment in the Kerr project of over \$15,000,000 in reliance upon the good faith of the Indians, the Secretary of the Interior and the Commission.

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The Indians cannot "run with the hare and hold with the hounds".

(14) The Commission is in error, p. 21, in adopting the Van Scoyoc profitability theory when that theory is based upon the following errors which it does not evaluate, and it is also in error in basing its decision to do so in part upon the statement that *no party* excepted to the manner in which Mr. Van Scoyoc's analysis was performed. Since the Examiner rejected Mr. Van Scoyoc's approach, the licensee was under no obligation to except to his analysis. *Sunray DX Oil Co. v. F.P.C.*, 351 F.2d 395, 400, CA 10 1965.

(a) Van Scoyoc admits he is not valuing Indian land but the commercial value of a hydroelectric project (Tr. 542), and the operation of The Montana Power Company (Tr. 544-547);

(b) The value of these tribal lands for power purposes should be the same no matter who the operator or owner of the power plant is, a public utility, an industry, an individual, or a municipality or a cooperative. Mr. Van Scoyoc admits that his method could have substantial variations dependent upon who the owner of the power facilities might be (Tr. 544-547);

(c) In order for a theory to be sound as the basis for determining commercial value of lands for power purposes, it must stand the test of its applicability to other similar situations. That the method is unsound is shown on Tribes' revised Exhibit No. 9, where if this method were applied

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to valuing the lands of the Warm Springs Indians, used by Portland General Electric Company at their Pelton and Round Butte projects, those lands would have no value for power purposes and Portland General Electric is paying the Indians some \$330,000 annually for the use of tribal lands;

(d) If Indian lands were valued in the State of California for power purposes under this theory, they would have no value. In California the rates of electric public utilities are fixed on the cost of service and the rate of return is within the six percent accepted by this witness. Consequently, under the Van Scoyoc theory there could be no excessive return in California. Only because Montana has elected to use the fair value rate base does his theory show in this instance what he claims are excessive profits.

(15) Although Opinion No. 529 does not mention the fair value rate base used by the Montana Commission, the Commission is in error when it determines profitability by rejecting the rate base used by the State of Montana to regulate about 97 percent of the sales of the licensee.

Only about three percent of the gross earnings of the licensee are derived from sales which by Part II of the Federal Power Act (not Part I) are subject to regulation by the F.P.C.,

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and the F.P.C., is expressly excluded from rate regulation of 97 percent of the licensee's sales by § 19 of the Act. Any action taken in this proceeding must rest upon the license and Part I of the Act. There is no provision in either Part I or Part II of the Act conferring upon the Commission any jurisdiction over retail sales by this licensee when the Montana Public Service Commission regulates the rates for those sales and prescribes the rate base to be used.

(10137)

On June 23, 1958, the Montana PSC issued its Order No. 2723 in Docket No. 4550 increasing the rates of the licensee, *Montana Power Co.*, 24 PUR 3d 321, and concluding that the increase allowed would give the company a rate of return of 5.33 percent. On July 28, 1964 the Montana PSC in an unreported letter order required the licensee to pass on to its customers the reduction in federal income taxes from 52 to 48 percent and concluded that this would give the company a rate of return of 5.42 percent. Both of these rates of return were calculated on the fair value of the licensee's property, which is a valid constitutional method for regulating this licensee's rates and the rates so modified were held to be reasonable. The Commission is in error in Opinion 529 and without statutory authority in thus setting

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aside the rate regulation of the State of Montana and in disregarding the rate base fixed by the Montana PSC;

(16) Other specific errors in the Van Scoyoc method also slant his conclusions unjustifiably in favor of the Indians. For example:

(a) Van Scoyoc "flowed thru" liberalized depreciation and rapid amortization at least for part of the years studied. Montana Public Service Commission by order requires the Montana Power Company to normalize both of these items (Tr. 555-561);

(b) Van Scoyoc did not include customer advances which the Montana Commission allows in the rate base (Tr. 561-565);

(c) Van Scoyoc did not include \$20,000,000 in plant account which the Montana Commission has found is plant in service (Tr. 591);

(d) Van Scoyoc did not include material and supplies in the rate base whereas the Montana Commission allows 50%

(10140)

of materials and supplies in the rate base (Schedule 5, line 31, EX CT No. 5);

(e) Van Scoyoc improperly excluded some \$400,000 of plant account in non-project lands from the rate base (Tr. 598-600);

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(f) Van Scoyoc excluded from rate base the cost of lands acquired by the Montana Power Company at the Kerr project but included Indian lands (Tr. 543);

(g) Van Scoyoc considered as a part of Montana Power Company's peak demand, power which merely flowed thru its system to other systems, thereby materially distorting the figures (Tr. 600-601);

(h) The Commission is in error, p. 27, in saying that headwater payments by the licensee were deducted in computing the benefits by the Van Scoyoc method. According to Mr. Van Scoyoc, they were not included: He was asked on cross-examination, Tr. 596:

Q. Would you refer to Schedule 3, please. With respect to your cost of service, do you have included therein any sums of money for headwater benefits?

A. No, sir, for the reasons stated in my testimony.

While he did not include any payments made by The Montana Power Company by reason of Hungry Horse releases in his cost of service at Kerr, he did include all sums paid by others to The Montana Power Company in his revenues for power supply, either in cash or power (CT 5 Schedule 4, Sheets 1-7). Thus he allocated to Kerr the portion of revenues received

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from downstream users by reason of Kerr storage releases but failed to include payments made by the Company to the United States for the benefits at Kerr of Hungry Horse water releases.



(10140)

(17) The Commission is in error in adopting the Van Scoyoc profitability method when that method did not apply his basic assumption of equal revenues for each dollar of investment.

Van Scoyoc states in his analysis (Tr. 473): "The basic assumption, which I believe is reasonable under the circumstances, is that each dollar of the Company's net investment rate base earns the same amount of return". He uses this assumption all thru his calculations until he reaches an allocation of the power supply revenues to the Kerr project at which point he shifts to an allocation of revenues based upon the relationship of capacity and energy between Kerr and the total system supply. If his basic assumption is right in allocating revenues to the transmission, distribution and power supply functions, it is equally right as applied to the allocation of revenues within the power supply function. As pointed out by witness Woy, had Van Scoyoc been consistent in his allocations, the profitability for this project would have been as shown in the following table where his basic principle of equal value for each dollar of

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investment is applied to his cost of service figures:

	Excess Earnings Reported by Van Scoyoc (Schedule 2, Sheet 3, EX CT 5)	Adaptation of Van Scoyoc Figures to Apply His Basic Assumption (MPCo. EX 34)	Difference
1958	\$1,216,879	\$1,002,875	\$ 214,004
1959	2,302,077	853,966	1,448,111
1960	2,229,410	889,982	1,339,428
1961	2,493,531	1,041,929	1,451,602
1962	2,210,309	1,208,008	1,002,301
1963	1,890,050	1,216,078	673,972
1964	2,047,612	1,399,160	648,452

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(18) The Commission is in error, p. 28, in accepting the Van Scoyoc profitability study and then applying the Sporseen percentage allocation to that profitability in arriving at an annual charge because to do so gives the Indians credit twice for the benefits derived from Hungry Horse water.

In the Van Scoyoc study, in order to find a computation of profitability of \$2,254,286, he used a method of allocating revenue to the Kerr project which gave full credit to the generation at Kerr project from Hungry Horse storage releases. He did this by an allocation of revenues to the Kerr project based upon the actual capacity and energy output of the Kerr project for

#### 10142

the years he studied, 1958 through 1964 (Tr. 473-475). This capacity and energy included all releases of Hungry Horse water used at the Kerr project.

He studied four methods of making allocations based upon the relationship of Kerr output to total system power supply (Tr. 475). Two of the revenue allocations were based upon kilowatt demand (Method A, line 1, schedule 2, sheet 1, EX CT 5) and on megawatt hours of energy (Method B, line 10, schedule 2, sheet 1, EX CT 5). He said that these two allocations established his outer limits (Tr. 475).

His other two methods reflect varying ratios between demand and energy of The Montana Power Company power supply and Kerr project share thereof. Method C assigned revenue,  $\frac{1}{2}$  to kilowatts of demand and  $\frac{1}{2}$  to megawatts of energy (Line 1, schedule 2, sheet 2, EX CT 5). Method D assigned revenue on average annual energy and excess demand basis (Line 1, schedule 2, sheet 3, EX CT 5).

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Each of these methods reflect the full use of Hungry Horse water storage releases thru the Kerr project.

He chose to rely on Method D above described (Tr. 487, question and answer 72; Tr. 490, question and answer 77).

His preferred method of allocating revenues as well as

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the others considered gave the Kerr project full credit for the revenues derived from Hungry Horse water releases used at that project. Had Hungry Horse water releases not been considered in his allocation of revenues, there would have been attributed to the Kerr project substantially less revenue than he found by this method and his \$2,254,286 profitability of the Kerr project would have been materially decreased.

The Commission in its decision, p. 28, applied a percentage determined by Mr. Sporseen in the amount of 42.13 percent to Mr. Van Scoyoc's profitability determination of \$2,254,286 to fix the rental charge.

In arriving at his 42.13 percent sharing to be applied to the net benefit Mr. Sporseen also gives full credit to Hungry Horse releases. Of the 42.13 percent division used by the Commission as adopted from Sporseen testimony 27.51 percent is derived solely from Hungry Horse water releases (Tr. 171-172).

Thus, by applying Mr. Sporseen's percentage to Mr. Van Scoyoc's profitability, the Commission has given the Indians credit for Hungry Horse water used at the Kerr project twice, once in determining the profitability and again in determining the percentage sharing of such alleged profitability.

Since Hungry Horse water was given its full credit in

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arriving at the profitability of Kerr project by Mr. Van Scoyoc, it is error to give it a second credit in the percentage division of Mr. Sporseen.

Hence, if a division is to be made, based upon Mr. Sporseen's allocation, the proper percentage is 14.61 percent rather than the 42.13 percent used.

(19) The Commission is in error, p. 26, in deciding that once the Indian-Company benefits sharing ratio is established it is subject to change by reason of the Hungry Horse storage releases.

Once a percentage to be used to represent the Indian share has been determined, there is no justification for changing that percentage when additional storage is added at Hungry Horse reservoir or at any other place. An additional supply of water from outside sources does not change the Indian-Company land ownership ratio; it merely adds to the power output from which the Indians derive an advantage in consideration of the Kerr plant output.

Let us assume, for instance, that the proposed Glacier View Dam is constructed on the North Fork of the Flathead River. It is to have usable storage of 3,160,000 acre feet, all of which would flow downstream to Flathead Lake and thence through

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the Kerr project. Under either the net benefit theory or the profitability theory, the increased capacity and energy available therefrom would be included in consideration of Kerr output. But it does not affect the Indian-Company land ownership ratio and *should not be considered to alter the percentage of sharing*. The same principle applies to Hungry Horse storage which is not using any Indian lands.

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In both the assumed situation of Glacier View and the actual situation of Hungry Horse, § 10(f) of the Federal Power Act requires The Montana Power Company to pay for the benefits received from such storage.

While it is true that location may have a bearing upon value as to many parcels of realty, as stated on p. 27, certainly there has been shown no situation comparable to this wherein the enhanced property is required to pay the owner of other property for the increased value by reason of such proximity. Thus, the owner of land adjacent to the intersection of two interstate freeways (Opinion No. 529, p. 27) may have a more valuable property for commercial purposes (if access to the freeways is provided) than formerly, but he is not required to pay to adjacent owners or to anybody else for that enhancement. Under § 10(f) of the Federal Power Act there is a requirement that the licensee shall

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pay for headwater benefits from Hungry Horse, but if it was the owner of land adjacent to the freeway intersection it would not be required to make a similar contribution.

The profitability formula adopted in Opinion No. 529 means that (1) The Montana Power Company must pay the United States for the use of Hungry Horse releases under § 10(f) of the Act, (2) the Hungry Horse releases are included in the revenue attributable to Kerr project by Mr. Van Scoyoc, (3) Hungry Horse releases account for over \$620,000 of the \$950,000 found by the Commission to be a reasonable rental in applying the 42.13 percent allocation of Mr. Sporseen, and (4) Mr. Van Scoyoc failed to give any consideration to the costs incurred by The Montana Power Company in arriving at his cost of service at the Kerr project and this error was carried over into the Commission's determination of profitability.

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It appears that the power output from the Hungry Horse storage water releases has been improperly overworked in arriving at a readjusted rental in this case and all of the preferential treatment has been accorded to the Indians without consideration of the equities.

(20) The Commission is in error, p. 21, in basing the readjusted Indian land rental upon the Van Scoyoc profitability

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theory in contradiction to the provisions of § 10(d) of the Federal Power Act and Article 34 of the license for Project No. 5 which require the licensee to establish amortization reserves out of the surplus accumulated in excess of a specified rate of return upon the net investment in Project No. 5 and to hold such reserves until the termination of the license or, in the discretion of the Commission, to apply them from time to time in reduction of the net investment.

If there are excess earnings from the operation of the Kerr project (which the licensee denies and which has not been established), the readjusted Indian land rental expropriates 42.13 percent thereof for the sole benefit of the Indian Tribes, contrary to the provisions of § 10(d) of the Act and Article 34 of the license.

On May 10, 1965 the Confederated Salish and Kootenai Tribes of the Flathead Reservation filed a petition to compel the licensee to establish and maintain amortization reserves as required by § 10(d) of the Act and Article 34 of the license. The order accompanying Opinion No. 529 requires the licensee to pay 42.13 percent of its so-called excess earnings as Indian land rentals in direct conflict with the provisions of § 10(d) of the Act and Article 34 of the license and precludes action

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on the petition of the Indian Tribes for a proceeding under those provisions.

(21) The Commission is in error in using this Indian land rental readjustment proceeding to determine the reasonableness of the rates of the licensee.

If the rate base of the licensee is to be established for the purpose of determining its earnings from the ownership and operation of the Kerr project, the determination of the rate base and the earnings should be in a proceeding where the Commission advises the licensee that it proposes to make such determinations and all of the issues relating thereto may be properly presented and decided in a lawful manner and not through the medium of a witness for one of the participants opposed to the licensee, especially where that witness says he does not follow the Commission's treatment in all instances (Tr. 599) but does not advise the Commission or the licensee in what particular instances he did not follow the Commission treatment. The procedure in the instant proceeding becomes prejudicial error under these circumstances.

**F. THE \$950,000 ANNUAL CHARGE IS NOT A REASONABLE ANNUAL CHARGE FOR THE USE OF THE INDIAN LANDS HERE INVOLVED**

(22) The Commission is in error, p. 28, in finding the

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sum of \$950,000 annual charge to be a reasonable annual charge.

A little over 2,000 acres of land belonging to the Indians is used between elevation 2883 and 2893, the elevations within which this project must operate. Such land if not used for power purposes would be grazing land which would have a value of about \$40 per acre, or a total value of

(10150)

about \$80,000 (Tr. 110-111). On the basis of its total value for any other purpose of \$80,000, the \$950,000 annual charge represents a return to the Indians of 1100 percent per year.

The Montana Power Company, in 1964, had \$299,476,406 invested in system property and plant (Item B by reference). That property and plant extends over some 58,266,880 acres of land. It includes 4,483 miles of electric transmission lines, 9,247 miles of electric distribution lines, 1,619 miles of natural gas distribution mains, 13 hydroelectric and 1 generating steam plants, four gas storage fields, water service facilities for 2 communities, and considerable natural gas and oil properties (Item B by reference, 1964).

The \$950,000 annual charge represents 3.027 percent of the total electric revenue of The Montana Power Company in 1959, and is equal to 8.54 percent of the net income of The Montana Power Company for that year.

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When viewed in the light of the total investment of The Montana Power Company in electric properties and the fact that the Indians have invested not one dime in the Kerr project or any other property of The Montana Power Company, the sum of \$950,000 is completely unreasonable as an annual charge for the lands herein involved. The annual charge of \$270,000 testified to by Mr. Seymour is a reasonable sum and should be the amount of reasonable annual charge determined by the Commission herein if the Commission is to make any objective determination.

If the amount determined in Opinion No. 529 is unchanged through the remainder of the license period, it will mean that The Montana Power Company will have paid to the Indians for the use of their lands in this project nearly \$24 million, not including interest charged by this Opinion in the sum of some \$2 million.



(10150)

The Indians will still own their land and power site. When this is compared with the total of \$4,500,000 awarded the Crow Indians for their Tribal power site and lands involved in the Yellowtail Dam and Reservoir taken by the United States in condemnation, it is obvious that the amount of annual charges determined in this Opinion is completely unreasonable.

(23) The Commission has erred, p. 22, fn. 8, in stating

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that the commercial value of the Kerr project approximates \$2,500,000 if the Van Scoyoc method is not used.

The net benefit theory requires the choice of alternate source of power from the next most economical source. That power may be either purchased or constructed. The unrefuted testimony in this case shows the availability of Bonneville power during the period of readjustment and when compared with the Kerr annual costs shows a net benefit of \$1,029,985 (MPCo. Exhibit 18, 32).

The Staff net benefit is erroneous because (1) it did not consider the next most economical source of power, and (2) it assumed a coal cost of 17.5¢ per million BTU when the record shows that the coal cost to The Montana Power Company during the period 1959-1969 would be 13.6¢ per million BTU (MPCo. Exhibit No. 10).

The Sporseen net benefit is equally erroneous because he did not use the next most economical source. The record is clear that there were more economical sources of power to be used as an alternative than the Buffalo Rapids projects selected by Mr. Sporseen.

(24) The Commission is in error, p. 19, fn. 5, in stating that The Montana Power Company has not pursued the Round Butte-

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Pelton Formula and the Commission Formula for reimbursement to the United States for Administrative Costs.

The Montana Power Company has stated in its exceptions to the Examiner's decision that he arrived at an unreasonable result. The above two formulas were applied to the Kerr situation to show what, under similar circumstances, a reasonable rental should be and both presentations show a reasonable result when those formulas were applied to be near or under the \$270,000 recommended by Mr. Seymour. On the Pelton-Round Butte formula applied to the Kerr project, the figure would be \$192,400 annual charge, and in the case of the Administrative Cost formula, the charge at Kerr would be \$248,102. These arguments are not abandoned, but the Company merely accepted the highest figure of the three approaches as a reasonable rental.

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## CONCLUSION

Opinion No. 529 does not "readjust" the annual Indian land rentals but "redetermines" what the Commission believes they should be. Unless the predecessor Commissions were in error as a matter of law in fixing the rental in 1930 and 1936 and again in 1959 and 1961, it cannot be said that the rental payments previously agreed to by all of the parties were unreasonable or contrary to the statutory intent or inconsistent with the license. Opinion No. 529 is in error in not facing up to this reality and in failing to recognize that an increase from \$238,000 to \$950,000 a year is unreasonable *per se*.

The most controversial phase of the original license negotiations and the 1936 amendment concerned the annual Indian land rental and the parties were unanimous in re-

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jecting profitability as a measure. The adoption of the profitability theory thirty-one years after Amendment No. 2 was issued is a shift of the first magnitude in underlying principle.

Even if profitability should be a method appropriate for use at this time, it has not been fairly applied here nor have the alleged profits of the licensee been legally determined or factually supported. Also, the Commission is not authorized by any provision of the Federal Power Act to fix, modify or set

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aside the retail rates providing for 97 percent of the revenues of the licensee or to determine the rate base to be used for fixing such rates and those rates and the rate base therefor are fully regulated by the Montana Public Service Commission and found to be reasonable by that agency.

For all of these reasons and those set forth in this application, the order in Opinion No. 529 should be set aside by the Commission and the only lawful approach of arbitration utilized as provided in the license.

Respectfully submitted,

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November 3, 1967

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UNITED STATES OF AMERICA  
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

The Montana Power Company ) Project No. 5

**Order Denying Applications for Rehearing**

(Issued March 21, 1968)

On October 19, 1967, the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes) and on November 3, 1967, The Montana Power Co. (Montana) filed an application for rehearing of Opinion No. 529 and the accompanying order issued October 4, 1967, readjusting the annual charges due under the license for Project No. 5, the Kerr Hydroelectric Development, for the use of Indian tribal lands. By letter dated November 3, 1967, the Secretary of Interior accepted our October 4, 1967, order. On November 17, 1967, we granted rehearing in order to afford further time for consideration of the issues.

The Tribes allege Commission error only in one respect; i.e., that the Commission failed to take into consideration the factor of income occurring to Montana by reason of downstream releases in assessing rentals due the Tribes. The Tribes contend this element of income, their portion of which they estimate to be \$42,000, was unavailable at the hearing and was not included in witness Van Scoyoc's profitability method adopted by the Commission.

Montana challenges Commission jurisdiction to readjust the annual charge and further alleges that the Commission

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erred in: readjusting annual charges effective May 20, 1959; requiring interest payments on such readjusted charge effective May 20, 1959;

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readjusting charges to include Kerr's third unit; and erred in utilizing the profitability method as the basis for determining annual rentals.

Both the Tribes and Montana improperly assume that the Commission's determination was based exclusively on the profitability method of Van Scoyoc and the allocation factor of Sporseen. This was not the case. The Commission's decision was based on the record as a whole, including the role of the Kerr project as a significant element in Montana's system and a major contributor to its earning power. The decision did use the profitability method as a guide in arriving at its end result, noting at the same time that a proper application of the net benefits method would have produced approximately the same result. In so doing, the Commission noted that the profitability method more closely conforms to the Commission's regulations on this subject.

Contrary to Montana's assertion, we have not decided the question whether our determination is subject to the approval of the Secretary of Interior. Since the Secretary has accepted the Commission's determination of this proceeding, the issue is not presented in this case.

None of the assignments of error and grounds for rehearing set forth in the applications for rehearing present any facts or legal principles which warrant any change or modification of the Commission's Opinion No. 529 and

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accompanying order. Accordingly, we reaffirm our original order and deny the applications for rehearing.

By the Commission.

Commissioner Carver dissenting filed a separate statement appended hereto.

(SEAL)

GORDON M. GRANT,  
*Secretary.*

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The Montana Power Company )

Project No. 5

(Issued March 21, 1968)

CARVER, Commissioner, *dissenting*:

For the reasons outlined in my concurring statement (Opinion 529, issued October 4, 1967), I would consider and decide whether the Secretary of the Interior has the power to veto the action of this Commission and of the courts, in fixing annual charges under Section 10(e) of the Federal Power Act.

Attached to this dissent is a copy of the letter of the Secretary of the Interior of November 3, 1967, wherein he signifies "acceptance of the October 4 Order" (Opinion 529). That acceptance is capable of being read as an affirmation of the contention made consistently and persistently in the progress of this case that the right of veto exists. [See, for example, the extensive exposition and legal justification of this theory in the Secretary's Brief Opposing Exceptions of November 8, 1966, pp. 12-13; in the Opening Brief to the Examiner of February 5, 1966, at pp. 7, 21 and 22; and the affirmation of the authority in an "Objection and Answer of the Secretary" filed with the Examiner



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on October 22, 1965, p. 5. See, also, the transcript references in my concurring statement, p. 1.]

It is the essence of the specification of error in the petition for rehearing, page 9, that a "substantive" right is jeopardized by applying section 10(e), if it is read as including approval of the readjusted charge by the Secretary.

By failing to affirm or deny the existence of the veto power, reciting rather that the issue "is not presented in this case", the Commission has only transferred the question to the Court of Appeals.

It would appear that if a genuine question exists, which has been put to the Commission in several ways, including the contentions in Briefs, in oral argument, in the Petition for Rehearing, and in the Secretary's letter filed after the decision, the very least the Commission should do would be to state its view of the law. Since I raised the issue in my concurrence, and the licensee has placed the question before the Commission in a substantive form, and since the Secretary's letter of November 3, 1967, is pregnant with his affirmation of the existence of the power, the reviewing court might conclude that the Commission

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concedes the Secretary's power to veto Commission action; it would be difficult for it to conclude that the Commission has denied it. In any event, the Court of Appeals will not easily be able to avoid the attack upon the integrity of its own jurisdiction.<sup>1</sup> If the Court feels constrained to deny

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<sup>1</sup> See particularly the language in the Objection and Answer of Secretary of the Interior, Stewart L. Udall, to Montana Power Company's Motion for Issuance of Subpoena, dated and filed October 22, 1965, at pages 4 and 5: "After, however, the proceeding has reached its conclusion, *including the exhaustion of appellate procedures*, the Secretary then has a responsibility to determine whether the Commission's findings should be accepted or rejected." (Emphasis added.)

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that the veto power exists as to its judicial determination, the Commission's present silence may become very embarrassing, whether the case is remanded to the Commission to fill the hiatus or otherwise.

It cannot be persuasively argued that the matter is moot because of the Secretary's letter of November 3. In view of the contention that the power exists until all appellate procedures are exhausted, the reviewing court would have to dispose of the question of this power negatively before it could modify the Commission's determination of section 10(e) charges in any respect. In other words, if the Court should find itself agreeing with the licensee-appellant on any of the numerous computational points, and reduce the annual charges, or determine that the charges were not applicable for the full period, or that the earlier case disposed of the issue as to the third unit, then it would be that court, not just the Commission, which would be exposed to exercise of the veto in the form so persistently asserted.

The failure of the Commission to face this issue squarely and determine it one way or the other creates a substantive deficiency which requires me to dissent.

JOHN A. CARVER, JR.  
John A. Carver, Jr.,  
*Commissioner*